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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANGEL DELVILLAR et al., Defendants and Appellants.	F069224 (Super. Ct. No. 1432625) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Marie Sovey Silveira, Judge.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Angel Delvillar.

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant Phillip Lopez, Jr.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant Hector Joaquin Rocha, Jr.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE CONCURRING AND DISSENTING OPINION

STATEMENT OF THE CASE

Hector Joaquin Rocha, Jr., Philip Lopez, Jr., and Angel Delvillar (together appellants) were all charged with first degree murder of Julio Jimenez (Pen. Code,[1] § 187, subd. (a); count 1), robbery of an inhabited dwelling (§ 212.5, subd. (a); count 2), and robbery of Corina Vargas (§ 211; count 3).[2] It was alleged the murder was committed during the course of a robbery and that all appellants were principals in the robbery (§ 189). It was further alleged that Lopez was at least 16 years old at the time of the offense. (Welf. & Inst. Code, § 707, subd. (d)(1).) As to the robberies, it was alleged that they were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); and that a principal in the robberies personally discharged a firearm causing the death of Jimenez (§§ 12022.7, 12022.53, subds. (d), (e)(1)). On February 8, 2013, a jury convicted appellants as charged.

On February 28, 2014, the trial court sentenced each appellant to a total term of 80 years to life, consisting of 75 years to life for the murder and firearm enhancements, plus a total of five years for the robberies. Various fines and fees were imposed.

Delvillar, Rocha and Lopez, jointly and individually, raise numerous claims attacking the validity of their convictions and sentences. As to Lopez, the matter is remanded to the trial court for the limited purpose of a *Franklin*[3] determination. In all other respects, we affirm.

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 Jamie Cerpa was also a codefendant, but has filed a separate appeal (case No. F073493).

3 *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). The purpose of a *Franklin* determination is to allow the juvenile to place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to

STATEMENT OF THE FACTS[4]

Accomplice Testimony

Domingo Becerra, Daniel Flores and Aquiles Virgen were all accomplices of appellants, and each testified against appellants at trial. Becerra testified in exchange for a 25-to-life sentence. Virgen was attacked while in custody awaiting trial, prompting him to agree to testify against appellants in exchange for a 15-to-life sentence. Flores, while in juvenile hall awaiting trial, also agreed to testify against appellants in exchange for a 10-year sentence and two strikes. The following is their version of the events in question.

On the evening of March 23, 2010, a group of Norteno gang members, coordinated by Johnny Montalvo, also known as "Manos," met at Jamie Cerpa's house in Keyes, near Modesto, to plan a residential robbery. The group, consisting of Rocha, Lopez, Delvillar, Becerra, Flores, and Virgen (at times referred to as "the group"), agreed to rob a house on Thrasher Avenue in Modesto, to steal drugs and money. Montalvo and Cerpa provided the group with firearms, consisting of two or three revolvers, a shotgun, and two pistols, as well as ammunition. The group made masks out of T-shirts and put them over their faces. The group, plus Montalvo and two other Nortenos got into two cars: a dark blue Jeep and a red Toyota. Rocha drove the Jeep. The red Toyota was to be used as a "diversion car" in case "things got out of hand" or got into "hot pursuit."

Shortly after midnight, the Jeep and Toyota drove to the house on Thrasher. When the two cars arrived, they found an unexpected SUV parked in the driveway. Inside the SUV were two men and a woman (at times referred to as "the passengers"). Rocha, Lopez, Delvillar, Becerra, Flores and Virgen jumped out of the cars, ran to the

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provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors.

[4] Because much of the testimony was accomplice testimony, and because there is an issue concerning this testimony, it is set out separately from the remainder of the facts.

SUV, pointed their guns at the passengers and yelled for them to get out of the SUV. The two men got out, but the woman passenger remained in the back seat until one of the group forced her out. Her purse was later taken.

Several of the group took the passengers to the backyard at gunpoint. Becerra wrongly thought one of the passengers lived at the Thrasher house, so he forced him to try to open the front door with his keys. When that did not work, the men took the passenger into the backyard with the others.

Rocha and another of the group broke the back windows of the house and climbed inside, along with Becerra, where they found an occupant. One of the group grabbed the telephone from the occupant's hand, hit him in the face with the butt of his pistol, and screamed at him, demanding drugs and money. The occupant protested and Rocha responded by firing two shots through the ceiling. One of the group took money from the occupant's wallet in his pants pocket.

At the same time, out in the backyard, others in the group forced the passengers to lie flat on the ground. When Flores heard shots inside the house, he looked over to see what was happening. One of the passengers jumped up and tried to run away, but was forced back down by Flores. Becerra, who was in the house, heard the passenger try to flee, so he left the house, walked up to the passenger and shot him three times in the back, killing him.

After the passenger was shot, the group fled the scene as police approached. The group jumped into the Jeep and drove away, followed by a police car. Rocha sped up and the police gave chase. Becerra told the others to give him their guns and masks. All did except Flores, who hid his pistol under the seat. Becerra took the guns and masks and threw them out the window onto the road. By this point, dozens of law enforcement vehicles were involved in pursuit of the Jeep. Eventually, the Jeep was forced to stop when a spike strip blew out the tires. The group leapt out of the vehicle and scattered. All except Delvillar were quickly found and arrested. Delvillar was not arrested until

September 17, 2010, in connection with another homicide, and subsequently remanded for the instant offense on September 27, 2011.

Virgen claimed that, while he was in jail with Delvillar, Delvillar told him he hid for a few hours in a laundry room near a house on Parklawn and walked away when everyone left. A large shirt was found in a laundry room on Parklawn Avenue, in Modesto, about 200 feet from where the Jeep stopped in the alley.

Immediately after his arrest, Becerra cooperated with the police and told them where he threw the guns and masks.

Testimony of Percipient Witnesses to the Crimes

On March 24, 2010, after midnight, Isaias Pantoja and his two-year-old daughter were asleep on a bed in the living room of their home on Thrasher Avenue in Modesto. Pantoja had rented the house only three weeks earlier and did not know who lived there before he moved in. Pantoja was not a drug dealer, and no one had come by asking to buy drugs. When he heard voices, shouting as if they were fighting or struggling, Pantoja got up and looked out the window and saw five or six people wearing blue and black clothing, their faces covered with handkerchiefs or towels. Four or five of them were carrying weapons – pistols and a rifle – and a strange SUV or truck was parked in the driveway. Three other people were being led to the backyard, including a man who was being dragged and hit or pushed. Pantoja called 911 on his cell phone.

While on the phone, Pantoja heard the kitchen window and several other windows in the back of the house breaking. His daughter was still asleep. Three people came into the kitchen through the window. Pantoja was trying to hold them back while on the phone giving police directions. Pantoja was asking for someone who spoke Spanish when he heard a gunshot. Later, Pantoja saw a bullet hole in the kitchen ceiling. Pantoja saw two guns inside the house. He heard two gunshots – one outside and one inside the house.

One of the men in the house hit Pantoja with his pistol, grabbed him and demanded, in English, "Where is the money?" Pantoja suffered a scratch and bruise on the bridge of his nose and a dark mark under his left eye from being hit with the butt of the pistol. Pantoja did not see the person who shot the gun inside the house, but it may have been the person who struck him.

Pantoja had approximately $110 in his wallet and $600 or $650 in his pants pocket he was going to send to his wife in Mexico. The men took the wallet out of his pants.

Pantoja thought the men were in the house for three to five minutes. When they heard sirens, they took off through the back of the house. Pantoja did not see what happened in the backyard.

While Pantoja was in the house, the people being led from the SUV to the backyard were Corina Vargas, Julio Jimenez and Florentine Soto, whom Pantoja did not know. Vargas testified under an immunity agreement. She testified she was convicted of a misdemeanor hit and run in 2011.

According to Vargas, near midnight on March 23, 2010, she was with her friend Soto, walking to the house on Thrasher to get methamphetamine. As they were walking, Soto waived down Jimenez, driving a green SUV; Vargas did not know the driver. Soto spoke to Jimenez in Spanish, and Vargas and Soto got into the car. It took less than five minutes to drive to the house on Thrasher, where Jimenez parked the SUV in the driveway.

Suddenly, the SUV was surrounded by people wearing black with their faces covered, demanding that the occupants get out of the vehicle. Soto and Jimenez got out; Vargas stayed in the backseat with her purse. One or two people got into the front seat of the SUV, threatened Vargas and told her to get out of the car and go into the backyard. Vargas saw one of the people with Jimenez at the front doorstep of the house, trying to open the door with his keys. Vargas heard Jimenez say, "No. No. It's not my house."

Two of the men led Vargas to the backyard and told her to get on the ground, where she laid on her stomach, scared for her life. One man stayed with Vargas, about six feet from her with his gun pointed at the ground. He told Vargas to shut up and she would not get hurt. Someone took Vargas's purse while she was on the ground.

While Vargas was still on the ground, she heard two or three gunshots from inside the house, windows breaking, an infant crying, yelling, and then a siren. People fled the house, yelling, "the cops are coming." People were telling Jimenez, who was standing 20 feet from Vargas, to get down. Within seconds, someone shot him. Vargas heard four or five shots rapidly fired, like the shots from one gun. Vargas only saw the back of the person who shot Jimenez.

After it was quiet, Vargas got up and walked home. She did not call the police, as she was scared. The following day, Detective Grogan came to her house and brought her purse and identification card.

At about half-past midnight, Police Officer Kalani Souza was dispatched to the house on Thrasher. In the driveway was an SUV. Pantoja was in the house with his daughter; he was shaking and had been injured. Some blood spatter was found in the house. In the backyard, Souza found Jimenez, lying on the ground unresponsive, with a wound to the back of his head.

The Chase

At 12:37 a.m., Officer Martin Lemus heard officers being dispatched to Thrasher and that a dark-colored Jeep was involved. On his way there, Lemus saw a dark blue Jeep followed by a sheriff's patrol car, about a mile and a half from Thrasher. The sheriff activated his siren.

The Jeep accelerated, weaving from lane to lane, and then turned right onto Hatch Road. Another patrol car joined the pursuit. The chase continued through Ceres to an unincorporated area of Modesto. Ultimately, the Jeep turned into an alley where four or

five occupants abandoned the vehicle and fled on foot. A total of 15 to 20 patrol vehicles participated in the chase.

The Arrests

Virgen was arrested in a backyard on Parklawn Avenue. He had a cell phone and a small amount of cash on him. Becerra, who was stuck between a detached garage and the fence of the same backyard, surrendered within 10 to 15 seconds after Officer Murphy shone a light on him. Daniel Flores was discovered, wearing all black, underneath a minivan in the front yard of the house. Rocha, wearing a black sweatshirt and tan pants, was found hiding behind a fence a few houses down. He had a blood stain on his left knee and dried blood on the his left palm. Lopez, wearing torn black clothing, was arrested in the same block of Parklawn. The Jeep was found in the alley with the passenger side door open.

At 1:24 a.m., two officers stopped a red Toyota Corolla driven by John Rivera, or "Snoop." John Montalvo, or "Manos," was in the front passenger seat; Santos Cardenas was sitting behind the driver. The officers let them go, as they raised no suspicions.

Search of the Jeep

A search of the Jeep on March 24, 2010, revealed a Taurus 9mm semi-automatic firearm loaded with 14 rounds in the magazine underneath the driver's seat. A pair of black leather gloves were on the front passenger seat; two pieces of black cloth were on the back seat. Some of the items of clothing and audio CDs had gang writing on them.

Autopsy

An autopsy of Jimenez showed tool marks on his forehead matching the pattern from the gun barrel of a .357 recovered by police. He had bruising and tearing on the back of his head from being hit with the butt of a gun. He died of two gunshot wounds to the back.

Other Physical Evidence

A videotape of the Thrasher house made on March 24, 2010, showed, inter alia, a mattress and child toys on the living room floor. There was one bullet hole in the kitchen ceiling and another in the ceiling of the room off the kitchen. A wallet was found next to a pair of pants in the hallway of the second bedroom, with $775 in cash in a pocket. A number of windows in the house were broken. The backyard fence was kicked out.

A surveillance video from a gas station in Keyes just after midnight on March 24, 2010, shows an "SUV" and a passenger car pulling into the station. Within a few minutes time, someone gets out of the right passenger door of the SUV, a second person gets out, the people get back into the vehicle and both cars leave together.

Detective Hicks was notified of the event at 1:17 a.m. After visiting the Thrasher site, he went to Parklawn Avenue, where he contacted Becerra, whom he knew. Becerra told Hicks, "I fucked up, Hicks." Becerra then helped Detective Hicks find evidence along the chase route – a single barrel shotgun, broken into three pieces, with a live round; red cloth; two loaded .357 revolvers; and a .38. Other items later recovered along the route included clothing, live shotgun shells, a black cotton glove, a white cloth, and a black latex glove.

Delvillar's wallet and a knife were found in the glove box of the red Toyota. A search of Cerpa's house in Keyes revealed six jacketed hollow point, .357 caliber bullets. Also found in the home were handguns containing fired and unfired rounds.

Delvillar was not arrested until September 17, 2010, in connection with another homicide, and was subsequently remanded for the instant offense on September 27, 2011.

Rocha's Defense

In his defense, Rocha called Detective Grogan, who interviewed Vargas the day after the robbery. In her interview, Vargas said she had her head down and eyes closed while in the backyard and did not observe what happened. Detective Grogan also interviewed Soto, but law enforcement lost track of him by the time of trial

Rocha also called several character witnesses, namely his mother, grandmother, father, and a family friend, all testified Rocha did not want to be involved with the gang and was taking night classes to join the military.

Rocha testified in his own defense that, in early 2010, he was going to night school in order to qualify for the military. He claimed he wanted to join the military to get away from the gang culture and his neighborhood. He admitted taking part in several Norteno-related robberies before the Thrasher Avenue incident, but claimed the gang made him do it.

According to Rocha, he got a call on March 23, 2010, from Montalvo asking him to drive some gang members to a house in Keyes. He initially refused, but eventually agreed because Montalvo insisted and offered to pay for the gas, and he did not want to put himself or his family in danger. Rocha claimed he only learned later that night in Keyes that Montalvo and the others were planning a robbery. Rocha stated he was not given a choice and was ordered to drive his Jeep to the crimes. He tried to get out of it by drinking excessively, but Montalvo got angry and told him to stop drinking. Montalvo gathered about a dozen people at the Keyes location to plan the robbery. He supplied guns to everyone involved in the robbery, as well as makeshift masks made out of T-shirts and clothes. Rocha then drove the group to the house on Thrasher, after being given driving directions by Becerra.

When they arrived, another SUV was in the driveway and Becerra ordered the group to go through with the plan. Rocha claimed to be reluctant, but that Becerra demanded he get out of the Jeep. According to Rocha, the group pulled the passengers out of the SUV, were uncertain what to do next, tried to use one of the passenger's keys for the front door and, when that did not work, took the passengers as hostages into the backyard. Rocha claimed Delvillar ordered him to enter the house through the windows to retrieve the drugs and money. Once in the house, thinking the occupant Pantoja was running for a gun, Rocha fired a shot into the ceiling to stop him. He then fired another

shot into the ceiling to silence an argument between Delvillar and Pantoja. Rocha claimed Delvillar took the occupant into another room and then returned with the occupant bleeding from his face. Delvillar suddenly panicked and told Rocha they needed to leave. The two of them exited through the windows and ran for the Jeep. Rocha claimed he did not see a body in the backyard.

Once the group was back in the Jeep, Becerra commanded Rocha to drive. When he saw an officer behind him, he tried to pull over, but Becerra grabbed the steering wheel and told him to keep driving. The others in the Jeep encouraged him to drive faster. While they were speeding, Becerra asked for everyone's masks and guns. The Jeep was eventually partially disabled when it hit spike strips. The group jumped out of the vehicle, but Rocha was caught within minutes. He claimed he first learned someone had been shot at the Thrasher house when he was being questioned by the police. Rocha insisted that he did not do anything for the benefit of the Norteno gang on that night, but only acted out of fear that he would be killed if he refused.

Lopez's Defense

In his defense, Lopez called Detective Hicks, who had spoken to Becerra about the firearms used in the robbery. Becerra could not be certain which person had which gun, two of which were very similar looking and the shotgun was broken when found. Becerra contradicted himself several times regarding which guns Rocha and Lopez were carrying.

Delvillar's Defense

Delvillar did not present additional witnesses.

DISCUSSION

I. MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

Appellants contend the trial court abused its discretion when it denied their motion for a new trial based on newly discovered evidence that accomplice Becerra falsely

implicated appellant Delvillar in the robberies and murder, violating their due process rights under both the state and federal constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15.) We disagree.

A. Factual Background

A year after appellants were found guilty, the trial court heard appellants' motion for new trial, based on the discovery of statements by one of Becerra's fellow prison inmates, Andrew Briseno, ostensibly showing Becerra lied at trial. Delvillar's counsel filed inmate Briseno's declaration stating that Becerra admitted lying about Delvillar being involved in the robbery. According to Briseno, Flores and another inmate, Aylwin Johnson, were also present during this conversation. Flores did not dispute the statement. Briseno declared:

> "Domingo Becerra and Daniel Flores first starte[ed] bragging and arguing about who was the 'dirtiest rat' between the two of them. Domingo Becerra then told me that he had lied about Angel Delvillar being involved in the robbery in which Domingo Becerra was testifying for the prosecution. Domingo Becerra also said he lied about Angel Delvillar being a passenger in [the red Toyota] in that case. [¶] Domingo Becerra said that he lied about Angel Delvillar being involved in the robbery so he could get his deal to testify … he was only going to get 10 years in prison."

Delvillar's defense in this case was that he was not present at the crimes because he was not in the Jeep when it was stopped. The "newly discovered evidence," counsel claimed, came from an independent witness and supported the defense that Delvillar was not present during the robbery because, according to the declaration, he was not in the red Toyota either.

Following argument by defense attorneys and the prosecutor, the trial court concluded there was no basis to grant a new trial. As reasoned by the trial court,

> "[T]his goes to the credibility of Mr. Becerra. And [Lopez's defense counsel], I think, said, well, there will be evidence that he lied in front of two people. I think there was plenty of evidence that he lied in front of a whole courtroom of people, and he may have been lying in front of a

> courtroom of people – he admitted to being a liar. He admitted to being a liar to law enforcement, to other people, to people who are part of his own group. [¶] I think he admitted to being a liar to his mother, to his brother. I think he said he lied when he was testifying. I think he lied all the time. So the fact that there might be a declaration that would come from people saying he was a liar, I don't know that that changes anything."

The trial court reasoned further that, had the declaration stated that "there was a different person who was the shooter or there was a whole other group of people who were being protected, and there's some top secret thing that we never heard about, that might be a reason, but I don't think we heard anything like that." In summation, the trial court stated:

> "We're basically hearing there will be further evidence to show that the lead witness in the case is a liar, and everybody knows the lead witness in the case is a liar. There's ample evidence of that by everyone's admission, including argument of all of the attorneys in the case, lots of cross-examination, and I think very well done cross-examination by all the defense counsel before the jury in the case. [¶] [The jury] got the message. They knew what was going on. And by the jury instructions, they're allowed to believe some, all or none of any witness' testimony. They did their job on that, it would appear."

B. Legal Authority

A motion for new trial may be granted pursuant to section 1181 "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at trial…." For newly discovered evidence, the defendant must show that (1) the evidence, and not merely its materiality is, in fact, newly discovered; (2) the evidence is not cumulative; (3) it is probable that the evidence would cause a different result on retrial; (4) the defendant could not have, with reasonable diligence, discovered the new evidence before or during trial; and (5) the previous factors are "'shown by the best evidence of which the case admits.' [Citation.]" (*People v. Beard* (1956) 46 Cal.2d 278, 281; see also *People v. Howard* (2010) 51 Cal.4th 15, 43.) The trial court may also consider the credibility and materiality of the

evidence in determining whether it is reasonably probable the new evidence would have led to a different outcome. (*People v. Howard*, *supra*, at p. 43.)

On appeal, the trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. (*People v. Howard*, *supra*, 51 Cal.4th at pp. 42-43.) Determining a motion is completely within the trial court's discretion, and the court's ruling "'"'"will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'"'"' (*Ibid.*) It is also well settled that "'the claim of newly discovered evidence as a ground for a new trial is uniformly "looked upon with disfavor."'" (*People v. Gaines* (1962) 204 Cal.App.2d 624, 628.) Even where a trial court does not give a statement of reasons for its decision, "abuse of discretion is not presumed from a silent record, but must be clearly shown by appellant." (*People v. Preyer* (1985) 164 Cal.App.3d 568, 574.)

C. Analysis

Appellants have failed to show that a "manifest and unmistakable abuse of discretion" occurred when the trial court denied the new trial motion. (*People v. Howard*, *supra*, 51 Cal.4th at pp. 42-43.) Briseno's declaration amounted to impeachment evidence meant to discredit Becerra. However, "newly discovered evidence which would merely impeach or discredit a witness does not compel the granting of a new trial …." (*People v. Moten* (1962) 207 Cal.App.2d 692, 698; see also *People v. Hall* (2010) 187 Cal.App.4th 282, 299; see also *People v. Snyder* (1940) 36 Cal.App.2d 528, 535 ["Newly discovered evidence which is merely impeaching in character is not ground for a new trial …."].) Briseno's declaration impeaching Becerra's credibility by accusing him of lying for his own personal gain is not a sufficient basis for a new trial, as the trial court noted. (*People v. Jones* (1948) 89 Cal.App.2d 151, 153; *People v. Poor* (1942) 52 Cal.App.2d 241, 243, fn. 2 [trial court was not required to grant new trial even "when it is shown by affidavit of a witness that he committed perjury at the trial"].)

Even assuming error, it was harmless. Becerra's credibility was a central issue at trial. Defense counsel spent nearly five days cross-examining and impeaching him. The jury was very well aware of Becerra's impeached character and his motive to lie. Thus, the possibility that Becerra lied was "presented to the jury and undoubtedly was considered by it in determining the credibility of the witness." (*People v. Lee* (1935) 9 Cal.App.2d 99, 108, disapproved on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 773, fn. 2.) Even so, the jury thoroughly deliberated on Becerra's credibility and still found appellants guilty. Accordingly, any error in denying appellants' motion for a new trial was harmless under any standard of review. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

II. SEVERANCE AND RELATED MISTRIAL AND NEW TRIAL MOTIONS

Appellants argue that the trial court abused its discretion when it denied two separate motions to sever trial. Appellants claim further that the court compounded this error by denying their mistrial and new trial motions based on the prejudicial impact of the joint trial. We disagree.

A. Background

Before trial, Lopez and Delvillar moved to sever the trial. Delvillar specifically argued that the evidence against him was much weaker than against the other codefendants, and that he would be prejudiced by any association with them. The trial court denied the motions to sever.

Subsequently, during the presentation of defense evidence at trial, Rocha indicated he would testify in his own defense. Delvillar and Lopez then moved for Rocha to be severed from trial based on the potential for conflicting defenses. Rocha objected to the severance. The trial court denied the motion, citing *People v. Avila* (2006) 38 Cal.4th 491, and stating the hazard of inconsistent defenses in this case did not warrant severance.

After Rocha's testimony, Lopez and Delvillar moved for a mistrial, claiming Rocha's testimony helped the prosecution with their theory of the case and incriminated them. The prosecutor countered Rocha's testimony "did not materially change anything in the trial," and Lopez and Delvillar's concerns could be addressed through cross-examination. The trial court denied the mistrial motion, stated Rocha's testimony was in the same vein as much of the prosecution's accomplice-based evidence, which was not always consistent, and there was still "plenty of room for cross-examination and to allow the codefendants to have a fair trial."

Following the guilty verdicts for all appellants, Lopez and Delvillar moved for a new trial on numerous grounds, arguing, inter alia, that the trial court wrongly denied the severance motion after Rocha testified. The trial court denied the motion.

B. Applicable Law on Severance

Authorization to hold a joint trial of two or more defendants is provided by section 1098, which states in pertinent part that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials." This law thus establishes a legislative preference for joint trial, subject to a trial court's broad discretion to order severance. In *People v. Hardy* (1992) 2 Cal.4th 86, our Supreme Court described the guiding principles a trial court should follow when exercising such discretion: "'The court should separate the trial of codefendants "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony."' [Citation.]" (*Id.* at p. 167.)

We review a trial court's denial of severance for abuse of discretion (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; *People v. Alvarez* (1996) 14 Cal.4th 155, 189), based on "the facts known to the court at the time of the ruling" (*People v. Box* (2000) 23 Cal.4th 1153, 1195, disapproved on other grounds in *People v. Martinez* (2010) 47

Cal.4th 911, 948, fn. 10). Even were a reviewing court to find a trial court abused its discretion in failing to grant a defendant's motion to sever, the defendant would not be entitled to relief on appeal unless he could demonstrate, to a reasonable probability, that he "would have received a more favorable result in a separate trial." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41.) Conversely, even if a trial court acted within its discretion in denying severance, "'the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law.'" (*People v. Cleveland, supra,* at p. 726.)

C. Analysis

All three appellants were charged identically, based on common crimes and involving common events and victims. It was therefore a "'classic' case for joint trial." (*People v. Keenan* (1988) 46 Cal.3d 478, 499-500.) As such, "the difficulty of showing prejudice from denial of severance is so great that the courts almost invariably reject the claim of abuse of discretion." (*People v. Matson* (1974) 13 Cal.3d 35, 39.) Here, appellants have neither shown prejudice nor "gross unfairness" required for a due process claim. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 41; *People v. Cleveland, supra,* 32 Cal.4th at p. 726.)

Delvillar

Delvillar makes several arguments contending the trial court's denial of the severance motions was incorrect and violated his due process rights. We find none persuasive.

He first contends a finding of guilt by association was "very high" in this case, requiring severance both times it was requested. We disagree.

Delvillar relies on *People v. Chambers* (1964) 231 Cal.App.2d 23 in which the defendant Chambers was jointly charged with defendant Spitler. Spitler was charged with three separate assaults on patients in a rest home, none of which was the same

assault Chambers was charged with. Trial was replete with "voluminous evidence of unrelated acts of brutality by Spitler, admissible only because she was on trial for offenses unrelated to that charged against Chambers." (*Id.* at p. 27.) The jury also heard evidence that Chambers owned the rest home, was Spitler's employer, and when Spitler was arrested, she was "in Chambers' bedroom, he being in bed." (*Id.* at p. 29.) The court concluded severance should have been granted as Chambers was probably held vicariously responsible for the long-continued brutality of Spitler. (*Ibid.*)

Here, appellants were tried for the exact same crimes with virtually identical evidence, which likely would have been admissible against Delvillar in a separate trial. The evidence relating to Rocha and Lopez's gang association was no more prejudicial than Delvillar's own gang association, which was shown by his use of gang insignia, photographs of his gang tattoos, and his involvement in prior gang crimes. In addition, Becerra's testimony implicated all three appellants equally and would also have been highly relevant and probative in a separate trial.

Delvillar also contends severance should have been granted because there was an irreconcilable conflict between his defense and that of Rocha and Lopez. Delvillar's defense was that he was not present at all during the crimes, while Rocha and Lopez "raised a duress defense." Delvillar contends the offenses were antagonistic because Rocha incriminated him.

Antagonistic defenses, however, "'do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other.' [Citations.]" (*People v. Hardy, supra,* 2 Cal.4th at p. 168; see also *People v. Souza* (2012) 54 Cal.4th 90, 111.) If antagonistic defenses alone required separate trials, it "'would appear to be mandatory in almost every case.' [Citation.]" (*People v. Hardy, supra,* 2 Cal.4th at p. 168.) Here, Rocha attempted to cast blame on Delvillar, but this was insufficient to warrant severance either before or during trial, and did not prove any gross unfairness to Delvillar.

Delvillar next contends Rocha's testimony in his own defense required severance because Rocha's testimony caused instructional confusion. Delvillar's argument is premised on the argument that the accomplice and corroboration instructions given were erroneous. However, as explained below, those instructions were neither incorrect nor prejudicial (See part VI.D of the Discussion, *post*)

We also disagree with Delvillar's next contention that severance should have been granted because codefendant Virgen, who had not yet entered into a plea agreement or testified, might have given exculpatory testimony for him at a separate trial. Delvillar bases his argument on Virgen's initial statement to the police, in which Delvillar claims he exonerated him by not including him in the group committing the robbery. However, Delvillar provides no affidavit or declaration from Virgen that would have given the trial court a basis on this to determine whether Virgen's testimony was bona fide and whether there was a strong likelihood he would testify for Delvillar in a separate trial. In any event, Virgen eventually testified at trial, and this "exculpatory" evidence was heard by the jury when Delvillar's counsel, on cross-examination, presented the fact Virgen initially did not implicate Delvillar in the crimes.

Finally, Delvillar claims severance was justified because his defense was "much stronger" than Rocha and Lopez, because they were both caught fleeing from the crime scene and their defenses were limited to "state of mind and duress arguments." But while there was different circumstantial evidence tying Delvillar to the scene of the crime from the others, the accomplice and victims' testimony implicated each of the appellants largely the same, and the physical evidence at the scene and of the discarded weapons and masks was also equivalent for all appellants.

We find no abuse of discretion in denying the severance motion as to Delvillar, and, as such, no violation of due process. "The strengths and weaknesses of the prosecution's case – considering its circumstantial nature, the credibility of the witnesses, and the force of the physical evidence – for the most part were the same for [all]

defendants." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 151.) Thus, "the quantity and quality of the evidence implicating one defendant compared to the other" was not so disparate that the jury would have convicted Delvillar "based upon on the strength of the evidence against only one of them." (*Ibid.*)

Rocha

Rocha joins Delvillar's argument, to the extent it benefits him. However, Rocha forfeited his claim as to the first severance motion by failing to join the motion. And, as to the second, he affirmatively waived any such argument by objecting to the motion and stating he wished to be tried with the other codefendants. He cannot now argue these grounds on appeal. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1048.)

Lopez

Lopez also argues the trial court wrongfully denied the severance motions. We disagree.

First, Lopez contends his pretrial motion to sever should have been granted because his defense was "inconsistent" with the others because he did not take part in the planning of the robbery. This defense, however, is not antagonistic to the defenses of the others; the jury could have found Lopez did not plan the crimes, while also finding that the others did, and yet he participated in them.

Lopez also contends the trial court erred when it denied his severance motion when he discovered Rocha would take the stand in his own defense. As argued by Lopez, Rocha's testimony which "lump[ed] Lopez in with 'the gang' that was going to kill Rocha if he [didn't] cooperate or follow orders, put Lopez in a position in the jury's eyes which he could not refute without testifying and giving up his constitutional right to remain silent." But again, the fact that codefendants "might attempt to fix blame on each other d[oes] not by itself require separate trials." (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 150, fn. omitted.) Nor are separate trials mandated simply because "one defendant gives testimony that is damaging to the other and thus helpful to the

prosecution." (*People v. Turner* (1984) 37 Cal.3d 302, 313, overruled on other grounds by *People v. Anderson* (1987) 43 Cal.3d 1104, 1149.)

New Trial and Mistrial Motions

Appellants contend their motions for mistrial and for a new trial should have been granted because the trial court did not grant the motions to sever. On appeal, a trial court's ruling on a motion for new trial is subject to review for abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 667.) A motion for mistrial is also reviewed for abuse of discretion, and such a motion should only be granted when a party's chances of receiving a fair trial have been "irreparably damaged." (*People v. Ayala* (2000) 23 Cal.4th 225, 282.)

As explained above, we find the trial court's denial of the severance motions proper. Therefore, appellants' motions for a new trial and mistrial, based on the lack of severance, were also properly denied. We reject appellants claim to the contrary.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Appellants contend they received ineffective assistance of counsel because none of their attorneys objected to the prosecutor's closing argument during rebuttal. We disagree.

A. Background

At a jury instruction conference outside the presence of the jury, the parties discussed CALCRIM 540B: Felony Murder: First Degree – Coparticipant Allegedly Committed Fatal Act. One element of the instruction states:

> "There was a logical connection between the cause of death and the robbery. The connection between the cause of death and the robbery must involve more than just their occurrence at the same time and place."

The prosecutor explained he intentionally omitted this statement from the requested instruction because it was to be given only if "the Court concludes it must instruct on causal relationship between felony and death." Here, the prosecutor argued, there was

"no causation issue whatsoever," as Becerra was an accomplice to the residential robbery and he shot Jimenez during the commission of the robbery.

Rocha's counsel disagreed, stating that the issue was not simply whether Becerra fired the fatal shot while the robbery was in progress, but rather why he fired it. Citing *People v. Cavitt* (2004) 33 Cal.4th 187, 193, he argued the felony-murder rule required both a causal relationship and a temporal relationship between the underlying felony and the act resulting in death. Counsel argued that, while Becerra killed Jimenez, all of his reasons for doing so were personal, that while Becerra had been told not to shoot anyone during the robbery, he felt he could gain status within the gang by doing so. Counsel for Lopez and Delvillar joined in the request that the element be included in the instruction. Although the trial court expressed doubts about whether it was necessary to give the requested addition to the instruction, it eventually granted the request and it was given.

During opening argument, over the course of two hours, the prosecutor explained the many legal doctrines applicable to the case, including aiding and abetting, felony murder, natural and probable consequences, and corroborating evidence, but made no mention concerning the element of causation.

During closing, Rocha's counsel argued Rocha participated in the robberies under duress. He also argued at length that the prosecutor failed to prove a logical connection between the homicide committed by Becerra and the robbery offenses.[5] At one point, Rocha's counsel stated he was "bothered" by the fact that the prosecutor had not talked about the causal connection of the felony murder rule. Defense arguments spanned four days, two entire days before the jury.

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[5] Delvillar's counsel argued Delvillar was not present during the robberies or killing. Lopez's counsel argued Lopez might have been present at the scene of the crime, but did nothing to facilitate the robberies or the shooting. According to counsel, Lopez was primarily the lookout person in front of the Thrasher house.

In closing argument, which was less than an hour in length, the prosecutor acknowledged he had not addressed the causal connection between the robbery and the murder, but asked the jury, "[w]hy belabor a nonissue?" The prosecutor asserted the defense argument on causal connection was unreasonable and explained why. According to the prosecutor, after Rocha fired the gun in the house, Jimenez got up from the ground outside and began to run. Becerra then shot Jimenez in response. As such, as argued by the prosecutor, the killing occurred during the commission of the residential robbery and the causal connection was clearly evident.

B. *Applicable Law*

Appellants now contend their respective counsel were ineffective for failing to object to the prosecutor's alleged misconduct in waiting until closing argument to make this argument, which did not allow appellants' counsel to respond.

Ineffective Assistance of Counsel

A defendant arguing ineffective assistance of counsel must show counsel's performance was well below the standard of reasonableness under prevailing professional norms and the deficiency undermined the fairness of the defendant's trial or, put another way, the result would have been more favorable to the defendant but for counsel's unreasonably substandard performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688; *In re Wilson* (1992) 3 Cal.4th 945, 950.) On review, we presume the trial counsel's decisions were proper and give deference to trial counsel's tactical choices. (*Strickland v. Washington, supra,* at pp. 691-694; *People v. Hinton* (2006) 37 Cal.4th 839, 876.) We assess the reasonableness of counsel's tactical decisions under the circumstances in which counsel made the decisions and do not second-guess them in hindsight. (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.)

Prosecutorial Misconduct

Prosecutors have wide latitude during closing arguments to argue their cases vigorously and to discuss and draw fair inferences from the evidence presented at trial.

(*People v. Stanley* (2006) 39 Cal.4th 913, 951; *People v. Fields* (1983) 35 Cal.3d 329, 363.) However, a prosecutor commits misconduct when he or she uses deceptive or reprehensible methods to persuade the jury. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1238, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Strickland* (1974) 11 Cal.3d 946, 955.)

A prosecutor need not act in bad faith to commit misconduct, but the defendant must have been prejudiced as a result. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) The conduct is prejudicial under the federal constitution when it infects the trial with such "'"unfairness as to make the resulting conviction a denial of due process."' [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial."' [Citation.]" (*People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1238; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) Either standard of prejudice requires reversal. (*People v. Hajek and Vo, supra,* at p. 1216.) The ultimate question the court must decide when a defendant asserts prosecutorial misconduct is whether it is reasonably probable that a result more favorable to the defendant would have occurred absent the disputed conduct. (*Strickland v. Washington, supra,* 11 Cal.3d at p. 955.)

C. Analysis

Here, we find no misconduct on the part of the prosecutor. Instead, we find the prosecutor used his closing, or rebuttal argument, for precisely the purpose it was designed – to respond to the arguments made by defense counsel.

Appellants disagree, insisting the prosecutor must have known appellants "intended to argue that the prosecutor had failed to prove" (underlining omitted) the logical connection between the murder and the robbery, and by waiting until rebuttal "violated the very foundation of the prosecutor's role in our criminal justice system" We disagree. No rule requires the prosecutor to address all potential defense arguments in his initial closing. (See, e.g., *People v. Fernandez* (2013) 216 Cal.App.4th 540, 563-564

[rejecting argument that defendant "was sandbagged because the prosecutor saved her most venomous attack for her rebuttal argument, giving him no opportunity to respond"]; *People v. Bryden* (1998) 63 Cal.App.4th 159, 184 [no misconduct where prosecutor waited until rebuttal argument to fully discuss certain evidence. "Rebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel [citation], and the prosecutor did that here.… Since no authority expressly prohibits the prosecutor's conduct, we conclude defense counsel did not act unreasonably by failing to object to the closing argument."].)

Nor can it be said, as argued by appellants, that the prosecutor committed misconduct in rebuttal by addressing the causal connection "element" at issue after failing to do so in his initial closing. The "logical nexus between the felony and the murder in the felony-murder context … is not a separate element of the charged crime but, rather, a clarification of the scope of an element." (*People v. Cavitt, supra,* 33 Cal.4th at p. 203.) And there is no requirement a prosecutor need recite all facets of every element of each crime in opening argument. (*People v. Morales* (2001) 25 Cal.4th 34, 48-49.)

Appellants' reliance on *People v. Robinson* (1995) 31 Cal.App.4th 494, throughout their argument is misplaced. In *Robinson*, the prosecutor committed misconduct by withholding exculpatory evidence, referring to a defense witness's felony record against court orders, and questioning the same witness improperly about his custody status. (*Id.* at pp. 498-505.) Compounding these acts of misconduct, the prosecutor presented a very short "perfunctory" opening argument, followed by a rebuttal argument 10 times in length. (*Id.* at p. 505.) We find no similarities between the misconduct found in *Robinson* and the prosecutor's actions during rebuttal here.

Because we find no prosecutorial misconduct, we find no ineffective assistance of counsel. "Defense counsel does not render ineffective assistance by declining to raise meritless objections." (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 674, fn. 8; see also

People v. Zavala (2008) 168 Cal.App.4th 772, 780.) We reject appellants' claims to the contrary.

IV. RESPONSE TO JURY QUESTION

Appellants next argue the trial court erred in its response to a jury question during deliberation. In the alternative, they argue defense counsel were ineffective for failing to properly object. We disagree.

A. Background

The jury was instructed, inter alia and in pertinent part, with CALCRIM 540B, which instructs on a felony murder when a coparticipant allegedly commits the fatal act:

> "The defendants are charged in Count I with murder under a theory of felony murder. The defendants may be guilty of murder under a theory of felony murder even if another person did the *act* that resulted in this death. I will call the other person the perpetrator. [¶] To prove that a defendant is guilty of first-degree murder under this theory, the People must prove that: [¶] Number 1, the defendant aided and abetted the crime of robbery [¶] Two, the defendant intended to aid and abet the perpetrator in committing the robbery; [¶] Three, if the defendant did not personally commit robbery, then the perpetrator whom the defendant was aiding and abetting, personally committed robbery; [¶] Four, while committing robbery, the perpetrator caused the death of another person; [¶] And five, there was a logical connection between the cause of death and the robbery. The connection between the cause of death and the robbery must involve more than just their occurrence at the same time and place. [¶] A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent. [¶] … [¶] It is not required that the person killed be the victim of the felony. It is not required that the defendant be present when the death occurs. [¶] An *act* causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act.…" (Italics added.)

On the last day of jury deliberation, the jury sent a question to the trial court stating:

> "Clarification as to what 'act' refers to in Jury instructions page 44, line 12, word 2." [6]

The jury was referring to the second word "act" italicized in the instruction above.

In response, the trial court exchanged emails with the prosecutor and defense attorneys regarding the question and the felony murder instruction to which it referred. Subsequently, in the courtroom with all attorneys present, the trial court suggested the following response:

> "What the Court will propose to do is write back on the face of the question itself that the Court [h]as conferred with counsel and it is agreed that the jury should please refer to page 43, line 7 and the word 'act' in that reference. [¶] Any disagreement with that … ?"

The reference made by the trial court in response to the question is the first word "act" italicized above.

None of the attorneys voiced any disagreement. The trial court gave the attorneys another chance, stating, "[T]his is your time to address something important like a request from the jury about instructions or clarification." Delvillar's counsel stated he looked through the instructions and found no "independent definition of 'act' contained within the jury instructions." Hearing no further comment, the trial court then reiterated its response to the jury's question.

B. *Applicable Law and Analysis*

In criminal cases, "[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law." (*People v. Smithey* (1999) 20 Cal.4th 936, 985, fn. omitted.) "The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are

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6 A copy of the jury's actual request does not appear in the record. The information here is taken from the trial court's email discussion, which appears to quote the request in full.

themselves full and complete, the court has discretion … to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] … [Citation.] … It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Appellants' claim is that the trial court erred in responding to the question posed by the jury, claiming the trial court was obligated to infer that the jury was attempting to ask about the logical connection requirement of causation between the death and the robbery.

We agree with respondent that appellants have forfeited any such claims of error, because appellants consented to the trial court's response to the jury's question. The trial court specifically asked each defense attorney, and each acquiesced. Appellants accordingly cannot claim error for the first time on appeal with respect to the trial court's response. (*People v. Davis* (2009) 46 Cal.4th 539, 616-617; *People v. Rogers* (2006) 39 Cal.4th 826, 877.)

Even if appellants had not forfeited this claim, the trial court's response to the jury's question was not erroneous. The jury asked "what 'act' refers to in Jury instructions page 44, line 12, word 2." The jury made no mention about the causation or the logical-connection requirement. It expressed no confusion about the elements of felony murder. As such, the trial court's answer was directly responsive to the question, informing the jury that page 44's elaboration on the meaning of "act" referred to the word's initial appearance in the same instruction on page 43. Because the court's reply answered the jury's question wholly and succinctly, there was no error.

As such, we reject appellants' alternative contention that trial counsel was prejudicially deficient in failing to ask the trial court to elaborate. A defendant seeking reversal for ineffective assistance of counsel must prove both deficient performance and prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland v. Washington*,

supra, 466 U.S. at p. 687.) The failure to make a meritless argument or to request an inappropriate instruction is not deficient performance. (*People v. Prock* (2014) 225 Cal.App.4th 812, 821; *Strickland v. Washington, supra,* at pp. 687-690.)

V. LETTER CONTACTING JURORS

Appellants next argue the trial court erred when it declined to send a letter to the jurors providing them with defense attorneys' contact information and asking whether they would like to speak with defense attorneys. We disagree.

A. Factual Background

A month after being found guilty, Rocha filed a motion requesting the trial court disclose juror identifying information in order to investigate whether juror misconduct occurred. The prosecutor filed an opposition to the motion.

At a hearing on the motion, appellants' attorneys argued they should be entitled to juror information because they were unable to speak with jurors directly after the verdicts were returned. Appellants' attorneys specifically asked that the trial court "send a letter to each juror to inquire whether the jurors are willing to be contacted …." The prosecutor opposed the motion because there had been no showing of good cause. The trial court denied the motion, finding appellants had not shown good cause, pursuant to Code of Civil Procedure section 237(d).

Rocha's counsel then again requested the trial court consider "simply a letter to the 12 jurors saying in one letter with all four defense attorney[s] and our contact information indicating that we would like to speak with the juror if they're willing to speak with us and then it's up to them to contact us." The trial court denied the request, finding it was not "a procedure authorized by the Code; so that would be something extraordinary, it's not what the law requires or I'm not even sure it permits it."

B. Applicable Law and Analysis

In a criminal case, "personal juror identifying information," namely their names, addresses and telephone numbers, must be sealed after their verdict is recorded. (Code

Civ. Proc., § 237, subd. (a)(2).) However, Code of Civil Procedure section 206, subdivision (g) permits a defendant to request the release of sealed juror information upon a showing of good cause within the meaning of Code of Civil Procedure section 237, subd. (b).) (See *People v. Wilson* (1996) 43 Cal.App.4th 839, 852.) To show good cause, a defendant must make a showing that supports a reasonable belief jury misconduct occurred and further investigation is necessary to provide the trial court with sufficient information to rule on a defendant's new trial motion. (*People v. Jones* (1998) 17 Cal.4th 279, 317; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.)

The denial of a petition filed pursuant to Code of Civil Procedure 237 is reviewed under an abuse of discretion standard. (*People v. Santos* (2007) 147 Cal.App.4th 965, 978.) The trial court's discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316, italics omitted.)

Here, appellants concede there was no good cause warranting disclosure of the jurors information under Code of Civil Procedure section 237. As such, this failure to show good cause bars them from accessing the sealed juror information, whether by direct disclosure or by indirect request in a letter. (See Code of Civ. Proc., § 237, subds. (b)-(d).)

Appellants' situation is similar to that in *People v. Jefflo* (1998) 63 Cal.App.4th 1314, in which the defendant requested juror information, but did not provide good cause. Instead, the defendant suggested, similarly to appellants here, that the trial court prepare a letter on its own stationary, adding counsel's name and address, and asking each juror if they wished to contact counsel to discuss the case. (*Id.* at pp. 1318-1319.) The appellate court found no abuse of discretion on the part of the trial court's denial of the request, as the request did not meet the threshold burden of demonstrating good cause. (*Id.* at pp. 1322-1323.)

So too, here, the trial court did not abuse its discretion in denying appellants' request, as they did not meet their burden of demonstrating good cause.

VI. INSTRUCTIONAL ISSUES

Appellants make numerous claims of instructional error. We address each separately.

A. CALCRIM No. 1402

Appellants contend the trial court erred by not elaborating on CALCRIM No. 1402, the standard jury instruction for the gang-related firearm enhancement charged under section 12022.53. Specifically, they contend the firearm enhancements attached to the robberies alleged in counts 2 and 3 must be reversed because the jury was not instructed that, for an aider and abettor to be held responsible for the use of a firearm by a principal, the act causing death must be logically connected to the underlying felony. We find no error.

1. Background

Appellants were charged, inter alia, in count 2 with robbery of an inhabited dwelling (§ 212.5, subd. (a)) and in count 3 with the robbery of Vargas (§ 211). The indictment alleged further, as to counts 2 and 3, that the robberies were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and that a principal in the robberies personally discharged a firearm causing the death of Jimenez (§§ 12022.7, 12022.53, subds. (d) & (e)(1)). Appellants were found guilty as charged.

Section 12022.53 establishes mandatory sentence enhancements for a defendant convicted of specified felonies who used or discharged a firearm in the offense. (§ 12022.53, subds. (b)-(e).) Subdivision (d) of that section mandates a consecutive 25 years to life enhancement for anyone who personally and intentionally discharged a firearm causing great bodily injury or death during the commission of one of the specified felonies. (*Id.*, subd. (d).) Subdivision (e)(1) of section 12022.53 imposes the enhancement on an aider or abettor who committed the felony for or with a criminal

street gang. (*Ibid*.) Read together, section 12022.53, subdivisions (d) and (e)(1) require the imposition of a consecutive 25 years to life enhancement when a defendant is convicted of the relevant gang enhancement, also convicted of murder, and any principal in the murder "personally and intentionally discharge[d] a firearm" causing death to a person who was not an accomplice. (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480.)

During the jury instruction conference, the trial court addressed CALCRIM No. 1402, the instruction for the gang-related firearm enhancement. The only remarks about the instruction were proposed grammatical changes, which the trial court agreed to, "hearing no comment otherwise." The jury was subsequently instructed, pursuant to CALCRIM No. 1402, in relevant part, as follows:

> "If you find a defendant guilty of the crimes charged in Counts II and III [the robberies] and you find that a defendant committed those crimes for the benefit of, at the direction of, or in association with the criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether for each crime the People have proved the additional allegation that one of the principles personally and intentionally discharged a firearm during that crime and caused death. You must decide whether the People have [proved] that allegation for each crime and return a separate finding for each crime. [¶] To prove this allegation, the People must prove that: [¶] Number 1, someone who was a principal in the crime personally discharged a firearm during the commission of the robbery; [¶] Two, that person intended to discharge the firearm; [¶] And three, that person's act caused the death of another person."

2. Applicable Law and Analysis

The trial court is required to instruct a jury on the general principles of law that are relevant to the issues raised by the evidence in a given case. (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) But a trial court "has no duty to give a clarifying instruction, absent a request, if the term in the instruction has a plain and unambiguous meaning that is '"commonly understood by those familiar with the English language" ….'" (*People v.*

Chaffin (2009) 173 Cal.App.4th 1348, 1351.) Furthermore, "[a] party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial. [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) A "[d]efendant's failure to request clarifying language forfeits the issues on appeal." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 877.) If a party requests clarification, we review the failure to give a requested instruction under *Watson, supra,* 46 Cal.2d at page 836, for a reasonable probability the defendant would have obtained a more favorable result had the instruction been given. (*People v. Hughes* (2002) 27 Cal.4th 287, 363; *People v. Wharton* (1991) 53 Cal.3d 522, 571.)

Appellants do not contend that the standard instruction given here, CALCRIM No. 1402, is facially erroneous. Instead appellants argue that, because there was an issue whether or not the death occurred during the commission of the underlying felony, the trial court should have included "some reference to the logical connection required for a nonkiller, especially when, as here, the jury asks for clarification[**7**] as to causation and the act of discharging the firearm causing death."**8**

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7 Referring to the jury's question concerning the word "act" in CALCRIM 540B. (See part IV of the Discussion, *ante*.)

8 Appellants do not suggest what language the trial court should have used to remedy the alleged instructional deficiency. They mention "element 5" of the felony-murder instruction and also refer to the optional (not given at trial) proximate-cause paragraph in CALCRIM No. 1402, to be given, sua sponte, if causation is at issue. However, the "logical connection" requirement in the CALCRIM 540B felony murder instruction is not the same as the "proximate cause" referenced in CALCRIM No. 1402. The natural and probable consequence doctrine in 1402 is based on foreseeability. Complicity is broader under the felony-murder rule, in that a felon may be held responsible for a killing by his or her cofelon even if the killing was not foreseeable to the nonkiller. (*People v. Cavitt, supra,* 33 Cal.4th at pp. 193, 238, fn. 2.) Thus, proximate cause, natural and probable consequences, and foreseeability have no bearing on felony-murder liability. (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1024; *People v. Chavez* (1951) 37 Cal.2d 656, 669.) Instead, in felony-murder, the focus is on the underlying felony, that is whether the felony has been completed, abandoned, stopped or

The language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request further amplification. (*People v. Jones* (1971) 19 Cal.App.3d 437, 447.) Thus, appellants' argument about the firearm-enhancement instruction is essentially that the trial court had a "duty to revise or improve upon an accurate statement of law." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) However, a trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel. (*People v. Kelly* (1992) 1 Cal.4th 495, 535.) And failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. (*People v. Lee, supra,* 51 Cal.4th at p. 638.)

We conclude appellants forfeited this claim by failing to object to the trial court's instruction or to request any modification or amplification of it at trial.

B. CALCRIM No. 1603

Appellants contend the trial court erred prejudicially in instructing with CALCRIM No. 1603, "Robbery: Intent of Aider and Abettor." We find no prejudicial error.

1. Background

During the jury instruction conference, all parties were asked if there was any objection to CALCRIM No. 1603. Hearing none, the trial court stated, "that will be used."

At trial, the jury was instructed pursuant to CALCRIM No. 1603 as follows:

> "To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while the perpetrator carried away … the property to a place of temporary safety. A perpetrator has reached a place of temporary safety with the

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is ongoing. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 684, fn. 13; *People v. Mason* (1960) 54 Cal.2d 164, 168-169.)

property if he or she has successfully escaped from the scene, is no longer being pursued, and has unchallenged possession of the property."

As noted by appellants, the bench notes to CALCRIM No. 1603 state: "**Do not** give this instruction if the defendant is charged with felony murder." (Boldface in original.)

In this case, the prosecution relied on the felony-murder theory to hold appellants responsible for Jimenez's death, based on the robberies of the inhabited dwelling and of Vargas. However, *People v. Fiore* (2014) 227 Cal.App.4th 1362 (*Fiore*) explains the limitation in this bench note is based on an issue raised in *People v. Pulido* (1997) 15 Cal.4th 713 (*Pulido*), which was not applicable to the facts in *Fiore* or here. In *Pulido*, our state Supreme Court held that a defendant is not guilty of felony murder under section 189 if the defendant aids and abets a robbery *after* an accomplice has "kill[ed] in the perpetration of [that] robbery." (*Pulido, supra,* at p. 716.) The court observed that, in light of its holding, the precursor to CALCRIM No. 1603, which was given, could incorrectly "suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule." (*Pulido, supra,* at p. 728.) Here, however, as in *Fiore*, there is no question that if appellants formed the requisite intent for robbery, they did so before Becerra killed Jimenez. Even if error occurred, we find no prejudice.

2. Applicable Law and Analysis

"'"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence …."' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 704.) On the other hand, the court "has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citation.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 681; see also *People v. Armstead* (2002) 102 Cal.App.4th 784, 792.)

Thus, it is error to give an instruction that correctly states a principle of law but does not apply to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; see also *People v. Rowland* (1992) 4 Cal.4th 238, 282 ["an 'abstract' instruction [is] 'one which is correct in law but irrelevant'"].) Giving an irrelevant or inapplicable instruction is generally "'"only a technical error which does not constitute grounds for reversal."' [Citation.]" (*People v. Cross* (2008) 45 Cal.4th 58, 67.) "There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant's prejudice." (*People v. Rollo* (1977) 20 Cal.3d 109, 123.) "In determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communication from the jury during deliberations, and the entire verdict." (*People v. Guiton, supra,* at p. 1130.)

Here, the trial court gave CALCRIM No. 401 on aiding and abetting, which states in pertinent part, "To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] Number 1, the perpetrator committed the crime; [¶] Two, the defendant knew that the perpetrator intended to commit the crime; [¶] Three, *before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime* [.]" (Italics added.) The court also gave CALRIM No. 540B regarding liability for first degree felony-murder by an aider and abettor. As given by the trial court, CALCRIM No. 540B provides in relevant part:

> "The defendants are charged in Count I with murder under a theory of felony murder. The defendants may be guilty of murder under a theory of felony murder even if another person did the act that resulted in this death. I will call the other person the perpetrator. [¶] To prove that a defendant is guilty of first degree murder under this theory, the People must prove that: [¶] Number 1, the defendant aided and abetted the crime of robbery; [¶] Two, *the defendant intended to aid and abet the perpetrator in committing the robbery*; [¶] Three, if the defendant did not personally commit robbery, then the perpetrator whom the defendant was aiding and abetting, personally committed robbery; [¶] Four, *while committing robbery, the perpetrator caused the death of another person*; [¶] And five, there was a logical connection between the cause of death and the robbery. The

> connection between the cause of death and the robbery must involve more than just their occurrence at the same time and place. [¶] A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.…"

The italicized portions of both instructions properly told the jury that in order to find appellants guilty of robbery and to find the robbery felony-murder special circumstance true, the People had to prove appellants formed the intent to commit the robbery or act as accomplice to the robbery, before or at the time Jimenez was shot. The trial court correctly instructed the jury regarding those principles. The court further instructed the jury "[s]ome … instructions may not apply, depending on your findings about the facts of the case" and to "follow the instructions that do apply to the facts" as the jury found them. (CALCRIM No. 200.) "[T]he jury is presumed to disregard an instruction if the jury finds the evidence does not support the application." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278.)

The jury returned a true finding on the robbery-murder special circumstance and found appellants guilty of the robberies. Thus, the jury necessarily determined appellants formed the requisite intent before or at the time Jimenez was shot under other instructions concerning timing. Nothing in the record suggests any confusion on the part of the jury over this issue. Consequently, the error in giving CALCRIM No. 1603 was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.)

C. Duress Instruction

Appellants contends the trial court erred in refusing to give a duress instruction for the gang enhancement. As argued by appellants, despite the fact that they cannot prove all elements of duress, they were entitled to an instruction stating an incomplete version of duress could still negate the intent required for the enhancement. We disagree.

1. Background

During the jury instruction conference, the parties agreed to CALCRIM No. 3402, which is a duress defense instruction to the crime of robbery. Defense attorneys then

offered their own proposed duress instruction which "goes to intent or mental state for the gang enhancement." The proposed wording read:

> "If the People prove beyond a reasonable doubt that defendant's life would not be in immediate danger if he refused a demand or request to commit the crime, evidence that the defendant acted under duress because of threat or menace may, nonetheless, be considered by you in determining whether or not the defendant formed the intent to assist, further, or promote gang conduct by gang members."

This request was based on defense counsels' theory that, perhaps while appellants' lives were not in *immediate danger*, they nonetheless participated in the robbery "to avoid removal that will come later" and they therefore did not have "the specific intent to act for the gang."

The prosecutor opposed the instruction, in part, because it was unnecessary in light of CALCRIM No. 3402, a duress instruction for robbery. As explained by the prosecutor, if the jury believed appellants defense of duress to the robbery, "the robbery goes away, so does the enhancement."

The trial court agreed with the People and declined to give the instruction, stating:

> "There is, I don't think, a reason to have another instruction on duress other than the instruction in 3402. The People have to prove the elements of each crime in each enhancement. Specific intent is one of the elements that they have to prove beyond a reasonable doubt. I think you can argue that. I'm not going to give a special instruction on that unless, after I adjourn this evening and I pull out this case, something strikes me as so compelling that I'm missing the boat on this instruction."

CALCRIM No. 3402, the duress instruction related to the robbery charge, was given and provided, in relevant part:

> "The defendant is not guilty of robbery if he acted under duress. The defendant acted under duress if because of … threat or menace he believed that his life would be in *immediate danger* if he refused a demand or request to commit the crime. The demand or request may have been expressed or implied. The defendant's belief that his life was in *immediate danger* must have been reasonable. [¶] When deciding whether the defendant's belief was reasonable, consider all the circumstances as they

were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient. The danger to life must have been immediate." (Italics added.)

2. Applicable Law and Analysis

Duress is a statutory defense codified in section 26. It states that a person is under duress and incapable of committing a crime if he or she was "under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." (§ 26.) The duress defense "requires a reasonable belief that threats to the defendant's life (or that of another) are both *imminent and immediate* at the time the crime is committed … threats of future danger are inadequate to support the defense." (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 100, italics added.)

We review the sufficiency of jury instructions de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) The trial court is correct to reject a requested instruction if it is an inaccurate statement of law. (*People v. Covington* (1934) 1 Cal.2d 316, 320; *People v. Fisher* (1936) 11 Cal.App.2d 232, 234.)

As discussed above, the trial court instructed the jury on duress as a defense to the robbery charge. Appellants contend that the trial court also had a duty to grant their request to instruct the jury on duress with respect to the gang enhancement. We disagree.

First, we note that appellants cite no authority holding that duress is a defense to a sentencing enhancement, such as a gang enhancement, as distinct from the underlying crime. "The defense of duress is available to defendants who commit crimes, except murder, 'under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.' (§ 26; see *People v. Anderson* (2002) 28 Cal.4th 767, 780 [.])" (*People v. Wilson* (2005) 36 Cal.4th 309, 331.)

Second, we reject appellants' argument because the instruction, as suggested, is not a correct statement of the law. There is no support for their notion that the defense of duress can exist without any immediate threat of harm.

Without the element of immediate danger, the defense of duress cannot negate criminal intent. "The duress defense, through its immediacy requirement, negates an element of the crime – the intent to commit the act. The defendant does not have the time to form criminal intent because of immediacy and immanency of the threatened harm …." (*People v. Heath* (1989) 207 Cal.App.3d 892, 901.) Future harm, such as a threat of death to be carried out at some undefined time, will not diminish criminal culpability. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 676-677.) Because appellants' proposed instruction explicitly assumed a lack of imminent harm, it would not serve as a basis for refuting criminal intent and the trial court was correct not to give the instruction.

D. Accomplice Instruction

Appellants next argue the trial court wrongly instructed the jury regarding the corroboration requirement of accomplice testimony because it specifically mentioned only the robberies and neglected any reference to the murder charge. We find no prejudicial error.

1. Factual Background

At the jury instruction conference, the trial court proposed making several grammatical changes to CALCRIM No. 335, on accomplice testimony. All parties agreed. The instruction, as given, stated, in relevant part:

> "If the crimes of robbery were committed, then Aquilles Virgen, Daniel Flores, Domingo Becerra, and Hector Rocha, Jr. … were accomplices to those crimes. [¶] You may not convict a defendant of robbery based on the statement or testimony of an accomplice alone. You may use the statement or testimony only if: [¶] Number 1, the accomplice's statement or testimony is supported by other evidence that you believe; [¶] Number 2, that The supporting evidence is independent of the accomplice's statement

> or testimony; [¶] And number 3, that supporting evidence tends to connect the defendant to the commission of the crime. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that a defendant is guilty of the charged crime. And it does not need to support every fact about which the witness testified. [¶] On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect a defendant to the commission of the crime. [¶] The evidence needed to support a statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice. Any statement or testimony of an accomplice that tends to incriminate a defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

2. Applicable Law and Analysis

Section 1111 provides: "[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense …." "Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court must evaluate whether it is reasonably probable that such error affected the verdict." (*People v. Williams* (2010) 49 Cal.4th 405, 456.) If the trial court failed to instruct the jury that "it could not convict defendant on the testimony of an accomplice alone," the error "is harmless if there is evidence corroborating the accomplice's testimony." (*Ibid.*)

As we noted previously, "in determining the correctness of jury instructions, we consider the instructions as a whole" (*People v. Friend* (2009) 47 Cal.4th 1, 49), we presume that jurors are "able to understand and correlate instructions" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), and we examine "whether there is a reasonable likelihood that the jury misconstrued or misapplied" the instructions (*People v. Clair, supra,* 2 Cal.4th at p. 663).

The accomplice-instruction given specifically stated Virgen, Flores, Becerra and appellant Rocha were accomplices to the robberies and that the jury "may not convict a defendant of robbery based on the statement or testimony of an accomplice alone." The instruction also explained that the jury "may use the statement or testimony of an accomplice to convict a defendant only if" it was sufficiently corroborated. In addition, the jury was instructed, pursuant to CALCRIM No. 301, that "[e]xcept for the testimony of [the accomplices], which requires supporting [evidence], the testimony of only one witness can prove any fact.…" Reading these instructions together, it is not reasonably likely that the jury would have disregarded the corroboration requirement when convicting appellants of murder.

Even if error occurred, it was harmless. There was sufficient independent evidence to connect each appellant to the crimes in this case. While the robberies and murder were separate crimes, the facts relied on to prove appellants aided and abetted the commission of the robberies are the same facts underlying the theory of felony murder. Independent evidence linked Delvillar to the crimes because, as explained above, he left his wallet in the red Toyota driven to the Thrasher Avenue robberies. Rocha and Lopez were both found by police moments after fleeing the crime in the Jeep; Rocha was hiding behind a fence and Lopez was nearby. Some of Rocha's belongings were found in the Jeep and he had blood on his hand shortly after the crime. In addition, Rocha himself stated to police after he was arrested that he had gone to the Thrasher Avenue house "just to get the dope," and he admitted firing a gun inside the house.

All of this independent evidence corroborated the fact that each appellant was involved in the robberies and resulting murder. Any error in instructing the jury was harmless under any standard. (*Watson, supra,* 46 Cal.2d at p. 836; *Chapman, supra,* 386 U.S. at p. 24.)

VII. SECTION 654

Appellants assert imposition of section 12022.53, subdivision (d), the firearm enhancements attached to each of the two robbery convictions, cannot be based on the single shooting of Jimenez. They argue that relying on the shooting of Jimenez for both robbery enhancements results in double punishment in violation of section 654. We disagree.

A. Background

Appellants were all convicted, as charged, with robbery of an inhabited dwelling (§ 212.5, subd. (a)) in count 2, and robbery of Vargas (§ 211) in count 3. As to the robberies, the jury found true the allegations that they were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); and that a principal in each of the robberies personally discharged a firearm causing the death of Jimenez (§ 12022.53, subds. (d) & (e)(1)).

At sentencing, the trial court imposed the same sentence on all three appellants: 25 years to life for the count 1 murder; four years for the count 2 residential robbery; and one year for the count 3 robbery. The court imposed a consecutive 25 years to life for the section 12022.53, subdivision (d) enhancement and another 25 years to life for the section 12022.53, subdivision (e)(1) enhancement on counts 2 and 3. The trial court imposed, but stayed a 10-year gang enhancement as to both counts 2 and 3.

B. Applicable Law

As stated above, the firearm enhancements were pleaded and proved pursuant to section 12022.53, subdivisions (d) and (e)(1). Section 12022.53 establishes mandatory sentence enhancements for persons convicted of specified felonies, who discharge a firearm in the commission of the offense. (§ 12022.53, subds. (b)-(e).) Subdivision (d) of section 12022.53 mandates a consecutive enhancement of 25 years to life for any person who personally and intentionally discharges a firearm causing great bodily injury or death in the commission of one of the specified felonies. Subdivision (e)(1) imposes

vicarious liability on an aider or abettor who committed the specified offense for the benefit of, at the direction of, or in association with a criminal street gang. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.)

Section 12022.53, subdivisions (d) and (e)(1), read together, require the imposition of a consecutive sentence enhancement of 25 years to life when a defendant is convicted of a specified offense committed for the benefit of a criminal street gang, and any principal in the offense "'personally and intentionally discharges a firearm'" that causes great bodily injury or death to any person other than an accomplice. (*People v. Hernandez, supra,* 134 Cal.App.4th at p. 480.) In order to find an aider and abettor subject to the sentence enhancement of section 12022.53, the aider and abettor must be convicted of the underlying offense (i.e., robbery), and the gang enhancement found true. (*People v. Garcia, supra,* 28 Cal.4th at p. 1174.)

Section 654 precludes multiple punishment for a single act or indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) In *People v. Palacios* (2007) 41 Cal.4th 720 (*Palacios*), three section 12022.53, subdivision (d), enhancements were imposed based on a single shot fired at a single victim during the simultaneous commission of three qualifying offenses: attempted premeditated murder, kidnapping for robbery; and kidnapping for carjacking. (*Palacios, supra,* at p. 724.) The Court of Appeal determined that punishment on all but one of these enhancements must be stayed pursuant to the multiple punishment prohibition of section 654, even though section 654 did not preclude separate punishment for the underlying offenses. The People petitioned for review to determine whether section 654 bars imposition of sentence for multiple firearm enhancements under section 12022.53. (*Palacios, supra,* at pp. 724-725.) Our Supreme Court reversed the judgment of the Court of Appeal, noting the Legislature mandated that section 12022.53 enhancements "shall be imposed '[n]otwithstanding any other provision of law,'" and held that "in enacting section 12022.53, the Legislature made clear that it intended to create a sentencing scheme unfettered by section 654."

(*Palacios, supra,* at pp. 728, 733.) "Nothing in the statute suggests the Legislature intended to override section 654 as to some applications of section 12022.53, but not others." (*Id.* at p. 733.)

The defendant in *Palacios* argued the Legislature could not have intended a scheme whereby one injury could result in as many 25-year-to-life enhancements as there were qualifying offenses. However, the *Palacios* court disagreed, stating the applicability of section 12022.53 enhancements "necessarily depends on what is 'technically ongoing at the time' a firearm is used. The Legislature premised section 12022.53 enhancements on a defendant's firearm use during underlying *crimes*. The statute 'prescribes substantial sentence enhancements for *using a firearm* in the commission of certain listed felonies.' [Citation.]" (*Palacios, supra,* 41 Cal.4th at p. 733, original italics.) The court held further that, "[a]lthough subdivision (d) incorporates an injury element, it still 'clearly serves' legislative goals in deterring the use of firearms in crimes." (*Ibid.*) In reversing the judgment of the Court of Appeal, the Supreme Court stated, the "Defendant fired a gun and caused great bodily injury while he was committing three crimes. The sentence imposed by the trial court is required by the statutory language and in keeping with the legislative purpose." (*Id.* at pp. 733-734.)

C. *Analysis*

Appellants acknowledge the holding of *Palacios*, but contend the case and its progeny did not "deal with the interpretation of the statute as it applies to a non-killer within the meaning of subdivision (e)," and is therefore not applicable.

Section 12022.53, subdivision (e)(2) states:

> "An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part I shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

Appellants argue section 12022.53, subdivision (e)(2) somehow implies that section 654 should apply because it "provides for *less* punishment by virtue of providing that punishment for the gang enhancement pursuant to section 186.22, subdivision (b)(1) be stayed."

We find nothing in this subsection which undercuts the holding of *Palacios*. Nor do appellants have a valid complaint regarding this subsection, since the trial court did, in fact, stay all of the section 186.22 gang enhancements in this case.

Appellants provide no authority to support their position that their section 12022.53 firearm enhancements should be treated differently under *Palacios* because they were non-shooters. We therefore find the trial court properly imposed both section 12022.53 enhancements to each appellant and reject their claim to the contrary.

VIII. RESTITUTION FINE

The trial court imposed a restitution fine of $10,000 on each appellant. (§ 1202.4, subd. (b).) The trial court also imposed a suspended restitution fine in the same amount, to be imposed only if parole is revoked. (§ 1202.45.) Appellants challenge the restitution fines on grounds that the trial court failed to consider their inability to pay. Specifically, they contend they are completely unable to make any restitution payments because, due to the true finding on the gang enhancements, they are ineligible for prison employment. We conclude appellants forfeited this challenge on appeal, but, in any event, find no error.

A. Applicable Law

Section 1202.4 requires a trial court to impose a "separate and additional restitution fine" in every case a person is convicted of a crime, unless it "finds compelling and extraordinary reasons for not doing so and states those reasons on the record." (§ 1202.4, subds. (b) & (c).) "A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine." (§ 1202.4, subd.

(c).) Instead, a defendant's inability to pay only becomes a factor if the court decides to impose a restitution fine above the statutory minimum. (*Ibid.*)

The statute defines the minimum restitution fine and gives the trial court discretion to impose a fine between $300 and $10,000. (§ 1202.4, subd. (b)(1).) The fine must be "commensurate with the seriousness of the offense." (*Ibid*.) The court may use a formula to set the fine that multiplies the statutory minimum "by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(2).)

Though the trial court should consider any relevant factors in assessing the fine "including, but not limited to, the defendant's inability to pay," the "inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine." (§ 1202.4, subds. (c)-(d).) "The court need not make express findings 'as to the factors bearing on the amount of the fine' and need not hold 'a separate hearing for the fine.' [Citation.] Unless there are '"compelling and extraordinary reasons,"' the defendant's 'lack of assets' and 'limited employment potential' are 'not germane' to his or her ability to pay the fine." (*People v. Urbano* (2005) 128 Cal.App.4th 396, 405.) It is presumed that a defendant has the ability to pay the fine (*People v. Romero* (1996) 43 Cal.App.4th 440, 448-449), and the defendant "shall bear the burden of demonstrating his or her inability to pay." (§ 1202.4, subd. (d).)

A claim the trial court failed to consider (or adequately considered) ability to pay in imposing a restitution fine is forfeited by failure to object at the sentencing hearing. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Gamache* (2010) 48 Cal.4th 347, 409; *People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*).)

B. Analysis

At the time of sentencing, appellants neither objected to the imposition of the restitution fine, nor requested a hearing to determine their ability to pay. Appellants acknowledge the holding in *Avila*, that by failing to object below and in not having

adduced evidence of inability to pay they have forfeited the argument. However, they contend, without citing authority, that an exception to *Avila* exists where, "by operation of law, an inmate has no ability to earn money because of his CDCR classification and there is no evidence in the record of any other source of income."

We disagree. The burden is on the defendant to establish that he or she is ineligible for prison work assignment; otherwise, the trial court may presume the fine will be paid out of defendant's prison wages. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.) We find appellants are not entitled to a remand for a hearing on their ability to pay the restitution fine, and we reject their claim to the contrary.

Issues as to Delvillar

IX. SUFFICIENT EVIDENCE OF DELVILLAR'S CONVICTIONS

Delvillar[9] argues there was insufficient evidence to supports his convictions. Specifically, he contends there was insufficient evidence corroborating the accomplice testimonies that he was present during the crimes. We disagree.

A. *Applicable Law*

In reviewing the sufficiency of the evidence to support a defendant's conviction,

> "we examine 'the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact reasonably could deduce from the evidence. [Citation.] The jury, not the appellate court, must be convinced of guilt beyond a reasonable doubt; for us, '[t]he test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.'" (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1024.)

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9 Although Rocha joins in the argument, "to the extent it benefits Rocha," the analysis of this argument appears irrelevant to Rocha, and we address it only with respect to Delvillar.

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) The testimony of accomplices must be corroborated by "such other evidence as shall tend to connect the defendant with the commission of the offense." (*Ibid.*) Such evidence may not come from, or require "'aid or assistance'" from, the testimony of other accomplices or the accomplice himself. (*People v. Davis* (2005) 36 Cal.4th 510, 543.)

Under section 1111, the jury had to conclude independent evidence linked Delvillar to the crimes before relying on the accomplices testimony. (See *People v. Vu, supra,* 143 Cal.App.4th at pp. 1021-1022.) "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, so long as it tends to implicate the defendant by relating to an act that is an element of the crime. [Citations.] The independent evidence need not corroborate the accomplice as to every fact on which the accomplice testifies [citation] and need not establish every element of the charged offense [citation]. The corroborating evidence is sufficient if, without aid from accomplice testimony, it '"'tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.'"' [Citations.]" (*Id.* at p. 1022.)

B. Analysis

It is not disputed that Virgen, Flores, Becerra and Rocha were accomplices. During their testimony each, in some way, connected Delvillar to the crimes.

Virgen testified that, when he was first arrested, he did not implicate Delvillar because he was not taken into custody and he wanted to protect him at that point. When Virgen was in jail at a later date, he came in contact with Delvillar, who told him that, after the Jeep hit the spike strip and everyone fled, Delvillar said he hid in a laundry room for a few hours until officers finished searching the area.

Flores did not name Delvillar as a participant when he first spoke to detectives after his arrest. At trial, Flores testified that Delvillar was at the house in Keyes before the robbery and that he was one of the ones who got into the Jeep to go to the Thrasher house.

Becerra did not implicate Delvillar when he was first interviewed by police. But at trial, he testified that Delvillar drove him and Manos to the Keyes house, where the robbery was planned. Becerra claimed Delvillar was in the red Toyota when the group went to the Thrasher house and, after the red car parked, he saw Delvillar "[w]alking around" as a look out.

Rocha testified at trial that Delvillar was one of the occupants in the Jeep on the way to the Thrasher house, that Delvillar entered the house with him, that it was Delvillar who took the occupant of the home into another room, and that he and Delvillar then exited the house, got into the Jeep and drove away.

Circumstantial evidence supports the accomplices' testimony placing Delvillar at the scene of the robberies and murder. Video surveillance at a gas station before the event showed the Jeep was accompanied by a red Toyota. A detective testified that the red Toyota was searched the day the crimes took place. At the time, it was parked at the house of Becerra's mother, to whom the car belong. Inside the glove box compartment of the red Toyota was Delvillar's wallet, containing his California identification card.

While not in and of itself sufficient to warrant a conviction, the evidence of the identification inside the glove box of the red Toyota was sufficient to "tend to connect" Delvillar to the offenses. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Douglas* (1990) 50 Cal.3d 468, 507.) The evidence circumstantially shows Delvillar was in one of the cars used to commit the robberies and subsequent murder on Thrasher Avenue. (*People v. Yeager* (1924) 194 Cal. 452, 473 ["It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight."].)

We find Delvillar's reliance on *People v. Robinson* (1964) 61 Cal.2d 373 misplaced. In *Robinson*, the only evidence linking one of the four codefendants, Drivers, to the murder were his fingerprints on an automobile found at the scene of the crime. The automobile belonged to codefendant Robinson, who had purchased it two days earlier from someone who lived in the same apartment house as codefendant Hickman. (*Id.* at pp. 378-379.) Drivers was Hickman's cousin and both he and Robinson were frequent visitors at the Hickman apartment, as was the original owner of the automobile. Extrajudicial confessions of three of the codefendants implicated each other and Drivers in the murder. Respondent claimed the necessary corroborating evidence of Drivers's guilt were the fingerprints. However, a fingerprint expert testified the found fingerprints "showed no more than that Drivers had been present in or about the [automobile] on some recent date." It found Drivers's fingerprints on the automobile were "equally susceptible to an inference that they came there innocently, as they are to any inference that their presence connects defendant with the commission of the crime." (*Id.* at pp. 398-399.)

Delvillar's wallet is not like a fingerprint. A fingerprint can be left on a surface for an indefinite period of time. And here, there was no evidence to otherwise explain how Delvillar's wallet got to be placed in the red Toyota, which belonged to Becerra's mother and was seen travelling with the Jeep on the way to the Thrasher Avenue robbery.

We view the evidence in a light most favorable to the verdict and must uphold the trial court's disposition if, on the basis of the evidence presented, the jury's determination is reasonable. (*People v. Garrison* (1989) 47 Cal.3d 746, 774.) Here, the jury reasonably determined that the wallet tended to connect Delvillar to the crimes, and we reject his claim to the contrary. (*People v. Perry* (1972) 7 Cal.3d 756, 774 ["Unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably *tend* to connect a defendant with the commission of a crime, the

finding of the trier of fact on the issue of corroboration may not be disturbed on appeal." (Fn. Omitted, original italics.)].)

Issues as to Rocha

X. INSTRUCTION THAT ROCHA WAS AN ACCOMPLICE

Rocha, a codefendant, testified in his own defense. In his testimony, he placed most of the blame on the other participants, including appellant Delvillar, and claimed he was not guilty because he was merely following orders. As argued in his brief, "[h]e told the jury he participated in the home invasion robbery that occurred on March 24, 2010 on Thrasher Avenue in Modesto, but did so unwillingly, under threat of death."

As noted in part VI.D of the discussion, *ante*, the trial court instructed, in part, with CALCRIM No. 335, that, if the robberies in this case were committed, Virgen, Flores, Becerra and appellant Rocha were accomplices to those crimes and their testimony needed to be corroborated. Rocha did not object to this instruction below. He now argues that the trial court erred in giving this instruction because it failed to take into account that, while Virgen, Flores, and Becerra were prosecution witnesses, he was one of the defendants, and the instruction, in essence, had the practical effect of directing the jury to find him guilty of the charges.

As a preliminary matter, we note the People's argument that any error with regard to the accomplice jury instructions is forfeited because Rocha did not object to the instruction. We find this argument without merit because a defendant may assert instructional error on appeal when it affects his substantial rights. (§ 1259 ["appellate court may … review any instruction given, refused or modified … if the substantial rights of the defendant were affected thereby"]; *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 103, fn. 34 [permitting defendant to raise instructional error in accomplice instructions where defendant did not object to instruction at trial].) Further, our Supreme Court has written that "[t]he trial court's duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence in a criminal case

is so important that it cannot be nullified by defense counsel's negligent or mistaken failure to object to an erroneous instruction or the failure to request an appropriate instruction. [Citation.]" (*People v. Avalos* (1984) 37 Cal.3d 216, 229.) We therefore address Rocha's argument on the merits but find no prejudicial error.

A. *Applicable Law and Analysis*

Again, as stated previously, an accomplice is defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. (§ 1111.) Rocha was charged with, and convicted of, the exact same offenses as his three codefendants. All of the evidence at trial placed him alongside the other codefendants during the commission of the offenses. Based on this, Rocha was an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 (*Hill*) [codefendant "was an accomplice as a matter of law" where he "was charged with the identical crimes, and all the evidence placed him in the company" of the other codefendants during the crimes].)

The question before us is whether the trial court should have instructed that Rocha was an accomplice as a matter of law. In support of his argument, Rocha relies on *Hill, supra,* 66 Cal.2d 536 in which three codefendants were charged with murder, intent to commit murder, and robbery. (*Id.* at pp. 542-543.) Only one codefendant, Madorid, testified in his own behalf. His testimony constituted a judicial confession as to him and implicated the other two codefendants. (*Id.* at p. 555.) While Madorid was "clearly" an accomplice as a matter of law, the trial court did not instruct as such. Instead, it instructed that it was for the jury to determine whether Madorid was an accomplice. The *Hill* court found no error, as the instruction, as given, avoided imputations of guilt of the other two codefendants "which might have flowed from the court's direction that the confessing Madorid was their accomplice as a matter of law." (*Id.* at p. 556.)

Rocha also relies on *People v. Valerio* (1970) 13 Cal.App.3d 912 (*Valerio*), in which codefendants, Valerio and Snipes, were charged with possession and transportation

of marijuana. (*Id.* at p. 916.) At trial, Snipes confessed to carrying the marijuana, attempting to hide it from police, and throwing a marijuana cigarette out the window of the car when they were stopped. (*Id.* at p. 918.) Valerio requested but the trial court refused to give an instruction that codefendant Snipes was an accomplice as a matter of law. Instead, the trial court instructed that the jury could find Snipes an accomplice and, if it did, her testimony as to defendant must be corroborated. (*Id.* at p. 924.) On appeal, the defendant argued the trial court erred in refusing his request to instruct that Snipes was an accomplice as a matter of law. The *Valerio* court disagreed, noting that, had it done so, it would, in effect, be instructing the jury that she was guilty of the offense charged, thereby invading the province of the jury with respect to the determination of her guilt or innocence. (*Ibid.*)

Rocha appears to read the language of *Hill* and *Valerio* to hold that it is always error for a trial court to instruct that a codefendant is an accomplice as a matter of law. However, cases appear to make a distinction between a codefendant who confesses at trial and one who denies guilt, but implicates codefendants, as Rocha did.

In *People v. Alvarez, supra,* 14 Cal.4th 155, the court held the trial court did not err in giving accomplice instructions, where two codefendants each testified in his or her own behalf, denied guilt, and incriminated the other to some extent. The court explained that the testimony of an accomplice who testified against a defendant deserves "'close scrutiny'" because "he has the motive, opportunity, and means to attempt to help himself at the other's expense," and that this rationale "remains true when the accomplice who testified against a defendant is himself a defendant." (*Id.* at p. 218.)

Similarly, in *People v. Box* (2000) 23 Cal.4th 1153, disapproved on other grounds in *People v. Martinez, supra,* 47 Cal.4th at page 948, footnote 10, the court held that the trial court should have instructed the jury that codefendant Flores's testimony, which attempted to place the primary responsibilities for the crimes on codefendant Box, should be viewed with care and caution to the extent it tended to incriminate Box. The court

found that, just as in the case of an accomplice called to testify by the prosecution, Flores's testimony was subject to the taint of an improper motive, i.e., that of promoting his own self-interest by inculpating Box. (*People v. Box*, *supra*, at p. 1209.)

In any event, even assuming instructional error, we find no prejudicial harm. Instructional error as to accomplice instruction is generally subject to the *Watson* standard of review. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214; *People v. Heishman* (1988) 45 Cal.3d 147, 163-164 ["Prejudice from failure to give proper accomplice instructions is measured by the test of *People v. Watson* ... i.e., whether it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error."].)

There is no reasonable likelihood the jury understood the accomplice-testimony instruction to direct a guilty verdict for Rocha. The jury was properly instructed that the prosecution bore the burden of proving Rocha guilty of all charges beyond a reasonable doubt. The jury was also instructed at length on the proper manner of evaluating the evidence and the necessity for it to decide "whether a fact in issue has been proved based on all the evidence." And the instructions for each of the crimes and enhancement again reminded the jury that "the People must prove" each element of the respective charges.

The prosecutor, in closing, never asserted the notion that Rocha was necessarily guilty of all crimes because he was an accomplice. Instead, the prosecutor's arguments were consistent with the understanding that the jury had to find all of the elements of the crimes beyond a reasonable doubt. The prosecutor framed the issue as a question "[D]id the defendants … either participate in or aid and abet a residential robbery?" The prosecutor did discuss Rocha's duress defense at length, but at no point told the jury to disregard any elements of the crimes due to the fact that Rocha was an accomplice. When explaining the accomplice instruction, the prosecutor stated, "I can't ask you to find any of the four defendants guilty without supporting evidence, evidence supporting the accomplices' testimony." The prosecutor then outlined the evidence corroborating

the accomplices' incriminating testimony. Any instructional error was not exacerbated by the prosecutor's argument, but instead reinforced the instruction as a whole – that the jury had to determine every element of the charged offenses.

Most importantly, the evidence of Rocha's guilt was overwhelming. He himself admitted that he went to the Thrasher house "to get the dope," he broke the windows to enter the home, and he fired his handgun twice. All of this evidence showed Rocha aided and abetted in the robbery and there is no question Jimenez was shot during the commission of the robbery. In addition, there is substantial evidence to support the jury's rejection of the defense of duress, as there was no credible evidence Rocha was acting to prevent immediate harm to himself or his family.

Issues as to Lopez

XI. CRUEL AND/OR UNUSUAL PUNISHMENT

Lopez was 16 years and five months old at the time of the offenses.[10] He was sentenced to (1) an indeterminate term of 25 years to life for the first degree felony murder conviction and (2) the midterm of four years for the robbery of an inhabited home and a consecutive one-year term for the robbery of Vargas, for a determinate term of five years. He was also ordered to serve an additional 25-year-to-life sentence for each robbery count, for a total aggregate term of 80 years to life. Lopez argues his statutorily required sentence violates his right to be free of cruel and unusual punishment guaranteed by the Eighth Amendment to the Federal Constitution ["Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted"] and article I, section 17 of the California Constitution ["Cruel or unusual punishment may not be inflicted or excessive fines imposed"]. We disagree.

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10 The probation report lists Lopez's date of birth as October 8, 1993.

A. Cruel or Unusual Under State Constitution

We first address Lopez's argument that his 80-year-to-life sentence is cruel or unusual under the California Constitution. Section 12022.53 was enacted for the purpose of imposing "'"substantially longer prison sentences … on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime." [Citation.]'" (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129.) Although it is the Legislature's role to define crimes and proscribe penalties for them, all statutory penalties are subject to the constitutional prohibition against cruel or unusual punishment contained in article I, section 17 of the California Constitution. (*People v. Dillon* (1983) 34 Cal.3d 441, 450.)

Under article I, section 17 of the California Constitution, cruel or unusual punishment occurs when a sentence is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) The *Lynch* court identified a three-pronged test for courts to use when reviewing disproportionality claims: "First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction. [Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions." (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) Defendants must overcome a "considerable burden" to show the sentence is disproportionate to his level of culpability. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) Therefore, "[f]indings of disproportionality have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

Lopez argues only that the sentence imposed on him violates the first prong of the test, namely, the nature of the offense and the offender, with particular regard to his self-described minimal participation in the crimes. "In examining 'the nature of the offense and the offender,' we must consider not only the offense as defined by the Legislature but

also 'the facts of the crime in question' (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts); we must also consider the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind." (*People v. Crooks* (1997) 55 Cal.App.4th 797, 806.)

Lopez participated in a gang-motivated residential robbery resulting in the death of an innocent man and injury to others. "There can be no dispute that murder is a serious crime, and that armed robbery and the use of a gun by a gang member in the commission of a crime present a significant degree of danger to society." (*People v. Em* (2009) 171 Cal.App.4th 964, 972-973 (*Em*).) In *Em,* the court found a life sentence for those convicted of aiding and abetting murder, as well as those guilty of felony murder who did not intend to kill, passed constitutional muster. (*Ibid.*) The seriousness of the crime is heightened by the facts that Lopez committed the crime with other gang members. "[G]roup criminal conduct calls for enhanced punishment." (*People v. Williams* (1980) 101 Cal.App.3d 711, 721.)

Lopez, attempts to minimize his involvement in the robbery by stressing he "never pistol whipped anyone," but instead only "[s]tood in the front yard as a lookout." However, Lopez's participation in the crime as a fellow gang member provided "integral assistance to the commission of the crime." (*Em, supra,* 171 Cal.App.4th at p. 975.) And, although Lopez denies any connection between Becerra's shooting of the victim and the robbery, the jury disagreed, finding a logical connection between the cause of death and the robbery when it convicted all of the appellants with first degree murder. Nor did the jury believe Lopez's characterization of himself as a victim of circumstance in the wrong place at the wrong time. Instead, the evidence supports the jury's finding that Lopez was voluntarily present while the gang members organized the robbery, armed his coparticipants, and carried out the planned robbery. After the victim was killed, Lopez and his cohorts fled from the police, trashed evidence, and tried to evade arrest.

Lopez's participation was "far more serious" than he contends. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 17.)

We also note Lopez's individual characteristics reinforce the conclusion that his sentence is not cruel or unusual. Although he was only 16 years old at the time of the current offense, his criminal history started at the age of 13, when he was declared a ward of the court and spent time in juvenile hall for misdemeanor convictions for vandalism and battery. A few months later, at age 14, Lopez was convicted of stealing a car and again ordered to juvenile hall. Three months after that, he was convicted of battery and returned to juvenile hall. He violated probation and, a few months later, at age 15, committed petty theft and was again sent to juvenile hall. Several parole violations followed and a month after starting an out-of-home program, Lopez absconded and had to be apprehended. Thereafter, he was convicted of vandalism and giving false representation to a police officer, was sent to juvenile hall, and before his 16th birthday, again violated probation. It was not until the proceedings began in the instant case that his juvenile wardship was terminated. None of Lopez's extensive criminal history at such a young age is a factor in his favor. (See, e.g., *People v. Barrera* (1993) 14 Cal.App.4th 1555, 1568 [record of numerous commitments in juvenile court system cut against defendant in cruel or unusual punishment analysis].)

Finally, Lopez's gang membership exacerbated his culpability and is a significant factor in finding his sentence not disproportionate. The primary purpose of a street gang is to commit acts of violence in order to intimidate the community and other gangs. Thus, as an active gang member, it is reasonable to infer he personally subscribed to its criminal purpose. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230.)

Lopez does not content his sentence is disproportionate to the punishments for more serious crimes in the same jurisdiction or to punishments for the same crimes in different jurisdictions, so we will not address those considerations in the *Lynch* analysis.

We cannot say the California Constitution compels a reduction of this sentence.

B. Cruel and Unusual under United States Constitution

Lopez also argues his sentence violates the Eighth Amendment to the United States Constitution because it is cruel and unusual to sentence a juvenile offender to a term which is functionally the equivalent to life without the possibility of parole (LWOP). He contends his overall sentence must be vacated and remanded for resentencing to comply with the requirements in *Miller v. Alabama* (2012) 567 U.S. 460 [132 S.Ct. 2455] (*Miller*) and *People v. Caballero* (2012) 55 Cal.4th 262 that it consider his youth and subsequent reduced culpability and impose a sentence reflecting these considerations.

Lopez further argues that enactment of section 3051 did not remedy this defect in his sentence. While on its face a 75-year-to-life sentence imposed on a juvenile may, in the absence of an appropriate trial record, be cruel and unusual, it is now clear, in light of *Graham v. Florida* (2010) 560 U.S. 48, that enactment of section 3051 has remedied any potential defect in Lopez's sentence.

In *Miller,* the United States Supreme Court:

> "found that mandatory life sentences for juveniles offended two strands of the court's sentencing jurisprudence: a group of cases which found that the severe punishments of capital punishment and mandatory life without the possibility of parole in nonhomicide cases, may not be imposed on certain classes of criminals, such as juveniles, perpetrators of nonhomicide offenses, or the mentally retarded [citations], because those punishments are disproportionate to the culpability of members of those classes; and a second related line of cases which require that before capital punishment or its equivalent may be imposed, sentencing authorities must consider the particular characteristics of the defendant and the details of the offense." (*People v. Chavez* (2014) 228 Cal.App.4th 18, 29 (*Chavez*).)

Thus, the *Miller* court held "the Eighth Amendment forbids a sentence that mandates life in prison without possibility of parole for juvenile offenders.… Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against

irrevocably sentencing them to a lifetime in prison." (*Miller, supra,* 132 S.Ct. at p. 2469, fn. omitted.)

C. Analysis

Cognizant of both the United States Supreme Court and our own Supreme Court's jurisprudence on the issue, before we can affirm these severest of possible sentences for a juvenile offense, we must have confidence that the trial court, fully informed of its discretion, determined that rather than transient immaturity which would require some degree of leniency, the juvenile's act reflected irreparable corruption which must be punished as severely as possible. (*Chavez, supra,* 228 Cal.App.4th at pp. 33-34.)

As noted, Lopez was 16 years old at the time he committed the subject offenses and the trial court imposed an 80-year-to-life sentence on him. We agree with Lopez that the trial court imposed a de facto life without possibility of parole sentence and that, in the absence of a record which reflects a determination by the trial court as to the nature of the offense, such a sentence is cruel and unusual. (See *Chavez, supra,* 228 Cal.App.4th at pp. 33-34.)

However, section 3051, which was enacted in 2013 and became effective on January 1, 2014, just before Lopez was sentenced, permits him to apply for parole in 25 years. The longest term of imprisonment imposed on Lopez by the trial court were the 25-year-to-life sentences for murder and for the gun enhancements, any of which is the "[c]ontrolling offense" within the meaning of section 3051, subdivision (a)(2)(B). Accordingly, Lopez will be eligible for parole pursuant to subdivision (b)(3) of section 3051, which states: "A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."

The Legislature enacted section 3051 specifically to comply with United States Supreme Court and California cases concerning juvenile life sentences. "The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*Caballero, supra,*] 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida*[, *supra,*] 560 U.S. 48, and *Miller*[, *supra,*] 132 S.Ct. 2455." (Stats. 2013, ch. 312, § 1.) Under section 3051, most youth offenders would be eligible for a parole hearing after a maximum of 25 years of incarceration, within the normal life expectancy of a juvenile.

The Attorney General asserts that section 3051 renders moot Lopez's cruel and unusual punishment claim. Very recently, in *People v. Franklin* (2016) 63 Cal.4th 261, 283-284 (*Franklin*), our Supreme Court agreed with the Attorney General that a juvenile serving a life sentence that is subject to section 3051 is serving a "sentence that includes a meaningful opportunity for release during his 25th year of incarceration." (*Franklin, supra,* at p. 280.) The court stated: "Such a sentence is neither LWOP nor its functional equivalent." (*Ibid.*) Accordingly, the court held the defendant's claims under *Miller* were moot. (*Franklin, supra,* at p. 280.)

Nonetheless, in *Franklin* the court noted that under sections 3051 and 4801, when considering a juvenile application for parole, the Board of Parole Hearings (Board) must "'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark feature of youth, and any subsequent growth and increased maturity ….'" (*Franklin, supra,* 63 Cal.4th at p. 277; §§ 3051, subd. (b)(3) & 4801, subd. (c).) Because it was not clear at the time of sentencing the defendant in *Franklin* had an opportunity to make a record with respect to these factors, the court found that remand was necessary for such a determination. "It is not clear whether Franklin had sufficient opportunity to

put on the record the kind of information that section 3051 and 4801 deem relevant at a youth offender parole hearing. Thus, although Franklin need not be resentenced- … [citation], Franklin's two consecutive 25-year-to-life sentences remain valid, even though section 3051, subdivision (b)(3) has altered his parole eligibility date by operation of law – we remand the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin, supra,* at p. 284.)

> "If the trial court determines that [the juvenile] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [The juvenile] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Franklin, supra,* 63 Cal.4th at p. 284.)

In light of *Franklin*, Lopez's Eighth Amendment challenge to his sentence is now moot. (*Franklin, supra,* 63 Cal.4th at p. 280.)

However, in supplemental briefing, Lopez argues remand is necessary in his case because the trial court and counsel did not have the benefit of *Franklin* at the time of sentencing. The Attorney General disagrees, stating, unlike the defendant in *Franklin*, Lopez had and used the opportunity to present information to the trial court about his juvenile characteristics and circumstances at the time of the offense.

We agree with Lopez. Because he was sentenced after the enactment of sections 3051 and 4801, but prior to the decision in *Franklin*, neither counsel nor the trial court could foresee the instructions which would be issued as part of that opinion with respect to the content of the evidentiary record to be developed by the juvenile offender. At the sentencing hearing in this case, Lopez presented three witnesses who testified to Lopez's good behavior while he was a student in juvenile hall after he was arrested. Lopez's counsel argued for a mitigated sentence based on Lopez's age at the time of the offenses, that he was being held responsible for someone else's "inappropriate action," and, that in a restricted environment, he did well and flourished. The prosecutor disagreed with Lopez's counsel's description of Lopez's involvement as well as his character, and reminded the trial court of Lopez's "probation report, his criminal history information, his social history, which is atrocious, [and his] premurder conduct [which] demonstrates an institutionalized, sociopathic, gang member beyond the control of his parents, our compulsory school system, and the juvenile court system." The probation report for Lopez lists his lengthy history in juvenile hall, numerous occasions from age 13 on; that he was beyond the control of his parents; that he was a gang member; and his numerous disciplinary infractions which occurred after his arrest while in jail. The probation report listed numerous factors in aggravation, but none in mitigation.

Lopez's counsel presented no information about any environmental, social, or psychological factors impacting Lopez prior to or at the time of the offenses. As explained recently in *People v. Jones* (2017) 7 Cal.App.5th 787:

> "Prior to *Franklin*, … there was no clear indication that a juvenile's sentencing hearing would be the primary mechanism for creating a record of information required for a youth offender parole hearing 25 years in the future. *Franklin* made clear that the sentencing hearing has newfound import in providing the juvenile with an opportunity to place on the record the kinds of information that 'will be relevant to the [parole board] as it fulfills its statutory obligations under sections 3051 and 4801.'" (*Id.* at p. 819, citing *Franklin, supra,* 63 Cal.4th at p. 287.)

As in *Jones*, with this pre-*Franklin* hearing, "we cannot assume that [defendant] and his counsel anticipated the extent to which evidence of youth-related factors was a critical component of the sentencing hearing. We do not suggest that every juvenile offender sentenced prior to *Franklin* and eligible for a parole hearing under section 3051 is entitled to a remand to present evidence regarding his or her youth-related characteristics and circumstances at the time of the offense. Rather, we conclude that, in this case, it is unclear whether [defendant] understood both the need and the opportunity to develop the type of record contemplated by *Franklin*." (*People v. Jones*, *supra*, 7 Cal.App.5th at pp. 819-820.)

Accordingly, we remand the matter so that the trial court can follow the procedures outlined in *Franklin* to ensure that such opportunity is afforded Lopez.

XII. INACCURACITES IN PROBATION REPORT

Lopez contends remand is necessary to correct certain inaccuracies about the offenses in the probation report. We agree.

A. Procedural Background

At sentencing on February 28, 2014, Lopez's counsel moved for a continuance due to errors in the just received probation report. Specifically, at issue here, counsel argued that the probation report, page 13, stated Lopez "broke windows to gain entry to the house, and that he entered through the broken windows and that he went into the house," which counsel claimed was not the testimony at trial.[11] Counsel argued Lopez "was never in the house.… [H]e never confined Ms. Vargas, and he did not break any windows."

The prosecutor agreed on the issue of "confining" Vargas, but stated the issue of who broke the windows, since multiple windows were broken, was a jury issue.

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[11] Page 4 of the Probation Report also states, under the heading "FACTS OF THE OFFENSE," "When the defendant, Virgen and Rocha made entry into the house …."

The trial court stated that it would be appropriate for the probation report to state, "one or more defendants broke windows," and not attribute it to Lopez specifically.

Lopez's counsel argued that this information was important "down the road" because it was what the parole board would look at someday in order to determine whether Lopez should or should not be paroled.

The trial court ordered an amended probation report, which was filed March 18, 2014, but the above referenced changes were not made. Lopez now contends the matter should be remanded for a hearing "to correct the 'Amended' probation report's references on pages 4 and 13 to … Lopez entering the house."

B. Applicable Law and Analysis

A presentence report by a probation officer is required following every conviction in this state. (§ 1203c, subd. (a)(1).) The report accompanies the defendant upon his or her commitment to the Department of Corrections and Rehabilitation. (§ 1203c, subd. (b).) California Rules of Court rule 4.411.5(a)[12] sets out the required contents of probation reports, including the facts and circumstances of the crime. The purpose of a probation report is to assist the trial court in "determining the appropriate term of imprisonment in prison or county jail" and to assist the Department of Corrections and Rehabilitation "in deciding on the type of facility and program in which to place a defendant." (Rule 4.411(d); see also *People v. Santana* (1982) 134 Cal.App.3d 773, 780-783.)

A sentencing or probation hearing "violates due process if it is fundamentally unfair." (*People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080.) "Reliability of the information considered by the court is the key issue in determining fundamental fairness." (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754-755.) Here, although the

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12 All references to the rules are to the California Rules of Court unless otherwise stated.

information was not changed in the amended report, the trial court was aware of the requested changes and complained of inaccuracies, and they clearly did not influence the trial court's sentencing decision. (*People v. Jarvis* (1982) 135 Cal.App.3d 154, 157-158; *People v. Lutz* (1980) 109 Cal.App.3d 489, 497; *People v. Maese* (1980) 105 Cal.App.3d 710, 725.) It is not probable a different result would have occurred in the trial court without the alleged inaccuracy. (*People v. Jarvis, supra,* 135 Cal.App.3d at p. 158.)

However, Lopez's claim of future possible harm at a possible parole hearing has merit and can easily be corrected on remand.

On remand, the trial court is directed to order an amended probation report to include the above referenced changes.

XIII. PROPOSITION 57

Also in supplemental briefing, Lopez argues that, in light of Proposition 57 (Prop 57), his case "must be remanded to the juvenile court for a transfer hearing or for such other remedy as appropriate." Specifically, Lopez contends Prop 57 applies retroactively to all cases not yet final, including his, because it reduces criminal punishment and created an affirmative defense that was not available during his trial – namely that the adult court acted in excess of its jurisdiction without affording Lopez a proper transfer hearing upon motion by the prosecutor. We disagree.

A. Prospective or Retroactive Application

Prop 57, the Public Safety and Rehabilitation Act of 2016, was enacted by the California voters on November 8, 2016, and became effective on November 9, 2016. (Cal. Const., art. II, § 10, subd. (a).) As pertinent here, Prop 57 eliminates former Welfare and Institutions Code section 707, subdivision (d), which gave prosecutors discretion under certain specified circumstances to "direct-file" a case against a minor in a court of criminal jurisdiction. After the passage of Prop 57, the charging instrument for all juvenile crimes must be filed in juvenile court. (See Welf. & Inst. § 602) Prop 57 then allows a prosecutor to make a motion to transfer the minor from juvenile court to a

court of criminal jurisdiction (Welf. & Inst. Code, § 707, subd. (a)(1) & (2)), and, upon that motion, the juvenile court "shall decide whether the minor should be transferred" based on a set of criteria set forth in the statute (Welf. & Inst. Code, § 707, subd. (a)(2).) In essence, Prop 57 effectively guarantees a juvenile accused felon a right to a fitness hearing before he or she may be sent to the criminal division for prosecution as an adult. A judge decides, based on a balancing of five criteria, whether a juvenile should be sent to adult court.

Prop 57 does not expressly address whether its changes to juvenile law are prospective or retroactive. Lopez argues the new procedures enacted by Prop 57 for transferring a minor from juvenile court to a court of criminal jurisdiction should be retroactively applied to cases, like his, which are not yet final. We disagree.

New statutes or changes in statutes ordinarily are applied prospectively only, "absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*).) As stated in *People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*), "Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent." The Supreme Court has "described section 3[**13**], and its identical counterparts in other codes (e.g., Civ. Code, § 3, Code Civ. Proc., § 3), as codifying 'the time-honored principle … that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is clear from extrinsic sources that the Legislature … must have intended a retroactive application.'" (*Ibid.*, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209 (*Evangelatos*).) Section 3 established a "default rule" that new criminal laws apply prospectively. (*Brown, supra,* at p. 319.) Courts have been "cautious not to infer

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13 Section 3 states that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared."

retroactive intent from vague phrases and broad, general language in statutes." (*Ibid.*) """[A] statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective."""" (*Id.* at p. 320.)

Prop 57 does not contain express retroactivity language in its provisions pertaining to juveniles. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 4, p. 141 et seq. (2016 Voter Guide).) The wording of the new transfer proceedings in Welfare and Institutions Code, section 707, subdivision (a)(1) state that a "district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction." Lopez is not in juvenile court, nor was he when the Proposition was enacted. On its face, newly enacted Welfare and Institutions Code section 707, subdivision (a)(1) does not apply to Lopez, whose case was adjudicated long before November 2016.

Similarly, newly enacted Welfare and Institutions Code section 707, subdivision (a)(2) provides that, after the prosecutor moves to transfer the minor to a court of criminal jurisdiction, "the juvenile court shall decide whether the minor *should be transferred* to a court of criminal jurisdiction." (Italics added.) This language describes a procedure in which the juvenile court determines whether to transfer a minor to a court of criminal jurisdiction in the first instance. For Lopez, the decision whether he should be tried in a court of criminal conviction has already been made. He was tried, convicted, and sentenced in a court of criminal jurisdiction. There is no reason for a juvenile court to now determine whether Lopez "should be transferred" to a court of criminal jurisdiction.

Had the voters intended for the juvenile law amendments of Prop 57 to apply retroactively to cases not yet final, they would have expected the initiative to include an express provision regarding retroactive application as to those portions of Prop 57. Because it does not, the presumption of prospective operation of the statute applies. (*Evangelatos, supra,* 44 Cal.3d at p. 1209.)

If the language of a statute does not expressly state it will be effective retroactively, it "will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Evangelatos, supra,* 44 Cal.3d at p. 1209.) Nothing in the election materials indicates that the drafters or voters intended for the juvenile provision of Prop 57 to apply retroactively. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) proposed text of Prop. 57, § 2, p. 141.) In addition, further support for prospective application of Prop 57 can be found throughout the 2016 Voter Guide, which uses prospective terminology. (See *People v. Floyd* (2003) 31 Cal.4th 179, 187-188.)

In sum, there is no "very clear" language indicating an intent to apply Prop 57 retroactively, and "'there is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all.'" (*People v. Litmon* (2008) 162 Cal.App.4th 383, 411.) We find that the voters did not express any intent regarding retroactive application in the text of Prop 57, nor can we clearly discern their intent from the ballot pamphlet. Therefore, we must follow section 3 and apply Prop 57 prospectively unless the *Estrada*[14] rule applies. (*Brown, supra,* 54 Cal.4th at p. 319; *People v. Mendoza* (2017) 10 Cal.App.5th 327, 345 (*Mendoza*).)

B. The Estrada Exception

Lopez contends that the principle enunciated in *Estrada, supra,* 63 Cal.2d 740, where the Supreme Court held that a legislative reduction in the statutory penalty for a crime must be applied to all non-final cases, compels a finding of retroactivity here because Prop 57 mitigates punishment. We disagree.

While, as noted above, new statutes or changes in statutes ordinarily are generally applied prospectively only, a well-recognized exception prevails when a criminal statute reduces the penalty for a particular crime. In that circumstance, the new, less punitive

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14 *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

statute applies to all defendants whose convictions are not yet final on appeal. (*Estrada, supra,* 63 Cal.2d at p. 745.)

Estrada involved an escape without force or violence from the California Rehabilitation Center at a time when that offense required a two-year minimum after being returned to custody before parole considerations. (*Estrada, supra,* 63 Cal.2d at p. 743.) Between the time of escape and the time of Estrada's conviction, the governing statutes were amended to reduce the two-year minimum term to six months. (*Id.* at pp. 743-744.) Estrada was being held in custody solely because of the minimum term required by the former version of the statute. (*Id.* at p. 744.) The Court found the reduction in penalty amounted to a legislative decision that the prior law had been too harsh, and held the amended statute applied to Estrada. "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id.* at p. 745.) This includes "acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Ibid.*)

Lopez argues Prop 57 amounts to a reduction in punishment, requiring us to find it retroactive under *Estrada*. We disagree, as Prop 57 addresses the conduct of trial rather than criminal behavior, nor does it expressly mitigate the penalty for any particular crime.

In *Tapia,* our Supreme Court, addressing then newly enacted Proposition 115, held that most of the procedural portions of Proposition 115, including one which gave judges in criminal trials the power to conduct voir dire instead of attorneys (see Code Civ.Proc., § 223) were not retroactive under *Estrada*. (*Tapia, supra,* 53 Cal.3d at p. 287.) Instead, as reasoned very recently in *People v. Cervantes* (2017) 9 Cal.App.5th 569, review

granted May 17, 2017, S241323 (*Cervantes*), *Tapia* emphasized that the retroactivity exception

> "turns on the type of legal change effectuated by the new or amended statute: changes in direct penal consequences like the one under consideration in *Estrada*, would call for retroactive application, while those like the one involved in *Tapia* that 'address the conduct of trials which have yet to take place, rather than criminal behavior which has already taken place,' are to be applied prospectively. (*Tapia*[, *supra,* 53 Cal.3d] at pp. 288-289.) Under that rubric, the transfer procedure dictated by Proposition 57 is not one that addressed 'criminal behavior which has already taken place,' but is more correctly identified as one 'address[ing] the conduct of trials which have yet to take place.' (*Tapia*, at p. 288.) This suggests its application should be prospective only." (*Cervantes, supra,* at pp. 600-601, fn. omitted.)

In addition, as explained in *Brown*, "*Estrada* is … properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*Brown, supra,* 54 Cal.4th at p. 324.)

The court in *Brown* addressed the 2010 amendment to former section 4019 which increased the rate at which eligible prisoners could earn conduct credit for time spent in local custody. (*Brown, supra,* 54 Cal.4th at pp. 317-318.) In passing this amendment, the Legislature did not "express[ly] declar[e] that increased conduct credits [we]re to be awarded retroactively, and [there was] no clear and unavoidable implication to that effect … from the relevant extrinsic sources, i.e., the legislative history." (*Id.* at p. 320.) Thus, the California Supreme Court applied the "default rule" in section 3 that no part of the Penal Code was retroactive unless expressly so declared. (*Brown, supra,* at pp. 319-320.) In doing so, the California Supreme court rejected the defendant's argument that *Estrada* "should be understood to apply more broadly to any statute that reduces punishment in any manner, and that to increase credits is to reduce punishment." (*Brown, supra,* at p.

325.) Instead, the *Brown* court called the *Estrada* rule a "contextually specific qualification to the ordinary presumption that statutes operate prospectively …." (*Brown, supra,* at p. 323.) While *Brown* acknowledged that a convicted prisoner released "a day early is punished a day less," "the rule and logic of *Estrada* is specifically directed to a statute that represents '"a legislative mitigation of the penalty for a particular crime[,]" and thus, a law rewarding good behavior could not qualify for that narrow exception." (*Id.* at pp. 325-326.)

Instead, as summarized in *Cervantes*:

> "We find the rationale underlying *Estrada* equally inapplicable to the procedural changes implemented by Propostion 57. While Proposition 57 will have a substantive impact on time in custody in some cases … the transfer procedure required under Welfare and Institutions Code section 707 does not resemble the clear-cut reduction in penalty involved in *Estrada*. Although it is now the juvenile court, rather than the district attorney, that makes the decision whether a juvenile felon will be tried as an adult, we may presume that many cases filed in juvenile court will still end up in adult court (with adult penalties) under Proposition 57, after the fitness hearing is held. Proposition 57 mitigates the penalty for a particular crime even less directly than the jail credits at issue in *Brown*. More like the voir dire procedure in *Tapia*, which affected who performed a particular function in the judicial process, Proposition 57 may or may not in some attenuated way affect punishment, but it is not a direct reduction in penalty as required for retroactivity under *Estrada*. (*Brown, supra,* 54 Cal.4th at p. 325.)" (*Cervantes, supra,* 9 Cal.App.5th at p. 601-602; accord *Mendoza, supra,* 10 Cal.App.5th at p. 349.)

Recently, the Fourth District, Division 3, addressed Prop 57 in *People v. Vela* 11 Cal.App.5th 68 in which it found a 16-year-old defendant, who had been tried and convicted as an "adult" in criminal court without a transfer hearing prior to the passage of Prop 57, was entitled to such a retroactive hearing. The court held that, since the intended purpose of Prop 57 was to rehabilitate rather than punish minors, the possibility for a minor's rehabilitation within the juvenile justice system was analogous to the possible reduction of a criminal defendant's sentence under *Estrada.* (*Vela, supra,* at pp.

78-80.) We respectfully disagree, and instead agree with the reasoning of *Cervantes* and *Mendoza*.

Affirmative Defense

Finally, Lopez claims Prop 57 created an affirmative defense that was not available during his trial – namely that the adult court acted in excess of its jurisdiction without affording Lopez a proper transfer hearing upon motion by the prosecutor. We reject Lopez's contention because jurisdiction is concurrent in crimes that subject the juvenile offender to adult prosecution.

Welfare and Institutions Code section 602 now reads: "Except as provided in [Welfare and Institutions Code] Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court." But, while the statute assigns jurisdiction over all juvenile criminal matters to the juvenile court, it does so explicitly subject to the exceptions in Welfare and Institutions Code section 707, which applies to a minor "alleged to be a person described in [Welfare and Institutions Code] Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age."

As stated recently in *Cervantes*:

> "We conclude, for crimes that qualify the juvenile offender for transfer to adult court, subject matter jurisdiction is concurrent between the criminal division and the juvenile division. 'The juvenile court and the criminal court are divisions of the superior court, which has subject matter jurisdiction over criminal matters and civil matters, including juvenile proceedings. (See Cal. Const., art. VI, § 10.) When exercising the jurisdiction conferred by the juvenile court law, the superior court is designated as the juvenile court. (Welf & Inst. Code, § 245.) Accordingly,

> when we refer herein to the jurisdiction of the juvenile court or the jurisdiction of the criminal court, we do not refer to subject matter jurisdiction, but rather to the statutory authority of the particular division of the superior court, in a given case, to proceed under the juvenile court law or the law generally applicable in criminal actions. (See *In re Harris* (1993) 5 Cal.4th 813, 837.)' (*Manduley* [*v. Superior Court* (2002) 27 Cal.4th 537], 548, fn. 3.)" (*Cervantes, supra,* 9 Cal.App.5th at p. 598.)

Here, the criminal division lawfully assumed jurisdiction under pre-Prop 57 law and retained jurisdiction throughout the trial. We reject Lopez's contention that Prop 57 deprived the criminal court of fundamental subject matter jurisdiction over him.

XIV. CUMULATIVE ERROR

Rocha and Lopez contend finally that the cumulative impact of all of the above errors deprived them of a fair trial. We have either rejected their claims of error and/or found any errors, assumed or not, were not prejudicial. Viewed cumulatively, we find any errors do not warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

DISPOSITION

The judgment is affirmed. As to Lopez, the matter is remanded to the trial court for the purpose of a determination under *People v. Franklin* (2016) 63 Cal.4th 261, and for an order that an amended probation report be prepared and filed.

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KANE, Acting P.J.

I CONCUR:

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POOCHIGIAN, J.

FRANSON, J., Concurring and Dissenting

I concur in all parts of the majority opinion except part XIII of the Discussion finding Proposition 57 (Prop 57) prospective only. Because Prop 57 emphasizes juvenile rehabilitation, I would find Lopez entitled to a transfer hearing.

While there is a presumption that laws apply prospectively rather than retroactively, this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1224.) In order to determine if a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature, or in the case of a ballot measure, the intent of the electorate. (*People v. Conley* (2016) 63 Cal.4th 646, 659.) The majority finds Prop 57's applicability prospective only, finding no intent otherwise in either the wording of the Proposition itself or the intent of the electorate.

Nor did the majority find the *Estrada*[1] rule applicable to Prop 57. In *Estrada*, the defendant was initially convicted of a drug offense and committed to a rehabilitation center. (*Estrada, supra*, 63 Cal.2d at pp. 742-743.) Estrada left the center at some point, was later captured, and pled guilty to escape without force or violence. (*Id.* at p. 744.) At the time of Estrada's escape, the punishment for an escape was at least one consecutive year in prison. There was also a statutory delay in an inmate's parole eligibility. After Estrada's escape, but before his conviction, the Legislature amended the applicable statutes to make an escape without force or violence a wobbler, punishable by imprisonment in the state prison for a term of not less than six months, nor more than five years, with no delay in parole eligibility. (*Id.* at pp. 743-744.)

The Supreme Court reasoned Estrada was "entitled to the ameliorating benefits of the statutes" as they had been amended. (*Estrada, supra*, 63 Cal.2d at p. 744.)

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1 *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

Recognizing the general rule of construction that, when there is nothing to indicate otherwise, a statute will be presumed to operate prospectively and not retroactively, the Supreme Court stated the "rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent." (*Id.* at p. 746.)

The *Estrada* rule, as later explained by our Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314, 323 (*Brown*), "supports an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." By imposing the more severe penalty after such a pronouncement does nothing "other than to satisfy a desire for vengeance." (*Estrada, supra,* 63 Cal.2d at p. 745.) This includes acts committed before passage of the legislation provided the judgment convicting the defendant of the act is not final. (*Ibid.*)

The majority finds the *Estrada* rule inapplicable because Prop 57 is not a direct reduction in penalty, as required for retroactivity under *Estrada*, but it instead may or may not affect punishment in some attenuated way. (*Brown, supra,* 54 Cal.4th at p. 325; *People v. Cervantes* (2017) 9 Cal.App.5th 569, 600, review granted May 17, 2017, S241323.)

I respectfully disagree. The express intent of Prop 57, according to the official ballot pamphlet, is to "Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles," and "Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 2, p. 141.) Prop 57 also provides that: "This act shall be liberally construed to effectuate its purposes." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop.57, Public Safety and

Rehabilitation Act of 2016, § 9, p. 146.) Thus "the intent of the electorate in approving Proposition 57 was to broaden the number of minors who could potentially stay within the juvenile justice system, with its primary emphasis on rehabilitation rather than punishment". (*People v. Vela* (2017) 11 Cal.App.5th 68, 70 (*Vela*).) The question then becomes whether this express intent extends to Lopez, whose case was directly filed in a criminal court by a prosecutor without the benefit of a juvenile transfer hearing, but whose case is not yet final on appeal.

I believe it does. The impact of the decision to prosecute Lopez in criminal court rather than juvenile court could mean the difference between his sentence of 80 years to life, or a discharge from the Division of Juvenile Justice's custody at a maximum of 23 years of age. As such, for a minor such as Lopez accused of various crimes, it is a potential "ameliorating benefit" to have a neutral judge, rather than a district attorney, determine if he is unfit for rehabilitation within the juvenile justice system. To hold otherwise would mean the electorate was motivated by "a desire for vengeance" against Lopez and similarly situated minors, which would be at odds with the intent of the electorate in its approval of Prop 57. (*Estrada, supra,* 63 Cal.2d at p. 745.)

The majority argues that *Estrada's* retroactivity rule only applies in the specific situations where the law unambiguously reduces a sentence of liability for a particular crime, which Prop 57 does not do. However, as explained very recently in *Vela*, " a close reading of *Estrada* reveals that the Legislature did not unambiguously reduce the sentence for Estrada's particular crime: an escape without force or violence." (*Vela, supra,* 11 Cal.App.5th at p. 78.)

As explained in *Vela,* Estrada had been convicted of an escape without force or violence under the then existing version of the escape statute. On the day of his escape, the statute made no distinction between an escape with force or violence or one without. Every defendant convicted of an escape was required to be sentenced to a term of not less than one year in state prison consecutive to his or her commitment offense and a two-year

minimum period for parole consideration after being returned to custody following the escape. (*Estrada, supra,* 63 Cal.2d at p. 743.) Prior to Estrada's case becoming final, the Legislature amended the escape and parole statutes. While the sentence for an escape with force or violence remained the same, a sentence for an escape without force or violence was changed to not less than six months nor more than five years. (*Ibid.*) The Legislature also amended the parole statute to no longer require a minimum period before parole consideration following an escape. In Estrada's case, he was being held in custody because his parole eligibility had been delayed. (*Ibid.*)

> "However, the sentence for Estrada's particular crime – an escape without force or violence – was not 'unambiguously reduced' by the amendment. That is, after the Legislature amended the escape statute, a court could still sentence a particular defendant to a one-year or greater consecutive sentence for a nonviolent escape and still have remained within the five-year sentencing range. Thus, the actual effect of the amendment was to create *the possibility* for a reduction in a defendant's sentence based on the discretion of the court and a defendant's particular circumstances." (*Vela, supra,* 11 Cal.App.5th at p. 79.)

As such, I would find, as did the court in *Vela*, that "[w]hen a change in the law allows a court to exercise its sentencing discretion more favorably for a particular defendant, the reasoning of *Estrada* applies." (*Vela, supra,* 11 Cal.App.5th at p. 79.) The *Estrada* rule was also held to apply in *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*), in which the defendant was convicted of a felony drug offense. While his case was pending on appeal, the drug offense statute was amended to change it from a straight felony to a wobbler, allowing it to be charged as a felony or misdemeanor. The *Francis* court reasoned that, while the amendment did not guarantee the defendant a lower sentence, making the crime punishable as a misdemeanor showed legislative intent that punishing the offense as a felony might be too severe in certain cases. (*Id.* at pp. 75-76.)

Prop 57 removes from prosecutors the discretion to directly file cases against minors in criminal courts. As such, a juvenile court judge can exercise his or her

discretion in some cases and determine that a minor should remain in the juvenile justice system rather than face prosecution and sentencing in the criminal courts. "For those minors who remain in the juvenile court, with its primary emphasis on rehabilitation rather than punishment, the potential effect of that 'ameliorating benefit' is analogous to the potential reduction in a criminal defendant's sentence as in *Estrada* and *Francis*." (*Vela, supra*, 11 Cal.App.5th at p. 80.)

Because Lopez's judgment is not yet final, I would conditionally reverse the judgment of the criminal court as to him and remand the cause to the juvenile court with directions to conduct a transfer hearing within 90 days from the filing of the remittitur. If, after the transfer hearing, the juvenile court determines that it would have transferred Lopez to a court of criminal jurisdiction, then the judgment would be reinstated as of that date. The criminal court would then conduct a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261.[2]

If, at the transfer hearing, the juvenile court determines Lopez is amendable to rehabilitation and should remain within the juvenile justice system, then his conviction would be deemed to be juvenile adjudications as of that date and the juvenile court would impose an appropriate disposition with its discretion under juvenile court law.

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FRANSON, J.

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[2] See the Disposition in the majority opinion.